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THE
ONTARIO LAW REPORTS

CASES DETERMINED IN THE SUPREME COURT
OF ONTARIO (APPELLATE AND HIGH
COURT DIVISIONS).

1914.

REPORTED UNDER THE AUTHORITY OF THE
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JUDGES

OF THE

SUPREME COURT OF ONTARIO

DURING THE PERIOD OF THESE REPORTS.

APPELLATE DIVISION.

First Divisional Court.

THE HON. SIR WILLIAM RALPH MEREDITH, C.J.O.
“ “ JAMES THOMPSON GARROW, J.A.
“ “ JOHN JAMES MACLAREN, J.A.
“ “ JAMES MAGEE, J.A.
“ “ FRANK EGERTON HODGINS, J.A.

Second Divisional Court.

THE HON. SIR WILLIAM MULOCK, C.J.Ex., K.C.M.G.
“ “ ROGER CONGER CLUTE, J.
“ “ WILLIAM RENWICK RIDDELL, J.
“ “ ROBERT FRANKLIN SUTHERLAND, J.
“ “ JAMES LEITCH, J.

HIGH COURT DIVISION.

THE HON. SIR JOHN ALEXANDER BOYD, C., K.C.M.G.
“ “ SIR GLENHOLME FALCONBRIDGE, C.J.K.B.
“ “ RICHARD MARTIN MEREDITH, C.J.C.P.
“ “ BYRON MOFFATT BRITTON, J.
“ “ JAMES VERNALL TEETZEL, J.
“ “ FRANCIS ROBERT LATCHFORD, J.
“ “ WILLIAM EDWARD MIDDLETON, J.
“ “ HUGH THOMAS KELLY, J.
“ “ HAUGHTON LENNOX, J.

*Mr. Justice Teetzel resigned his office on the 1st October, 1914.

ERRATA

Page 172, line 13, for "frowns" read "turns."

Page 184, head-note, 2nd line from end, for "6 O.L.R." read "8 O.L.R."

Page 282, line 4, for "[1909]" read "[1900]."

Page 335, line 6, for "73" read "873."

Page 470, head-note, 3rd line from end, for "Hayward" read "Haywood."

MEMORANDA

CALL TO THE BAR

In Michaelmas Term, 1914, the following gentlemen were called to the Bar:—

LeRoy Dale, Abraham Singer, Joseph Wilfrid Gauvreau, Daniel Webster Lang, William Norman Hancock, Frank Regan, John Gumaer Holmes, Victor Evan Gray, Howard Alfred Lorne Conn, John Albert Devaney.

In Hilary Term, 1915, the following gentlemen were called to the Bar:—

The Hon. Rodolphe Lemieux, Harvey Obee, Howard Morwick, Leon Stanley LeVernois, Bruce Fitzgerald Fisher, William Alfred Olmsted.

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SUPREME COURT OF ONTARIO

DETERMINED IN THE

(APPELLATE AND HIGH COURT DIVISIONS).

[APPELLATE DIVISION.]

1914

RE SOUTH OXFORD PROVINCIAL ELECTION.

Aug. 11.

MAYBERRY V. SINCLAIR.

SINCLAIR V. MAYBERRY.

Parliamentary Elections—Recount of Ballots—Ballot Paper Marked in Ink—Ontario Election Act, R.S.O. 1914, ch. 8, sec. 102—Ballot Papers not Stamped by Returning Officer—Sec. 71(2)—Imperative or Directory Provisions—Curative Section, 114—Ballot Papers Irregularly Marked—Discrepancy between Number of Ballot Papers Marked and Number Issued—Poll Book—Declined and Rejected Ballots—Form of Return.

Upon appeals by both candidates from the decision of a County Court Judge upon a statutory recount of the ballots cast at a provincial election, it was held:—

- (1) That a ballot paper marked by the voter in ink should be counted, although sec. 102 of the Election Act, R.S.O. 1914, ch. 8, directs that the voter shall mark his ballot, "making a cross with a black lead pencil;" the direction is not imperative.

The Wigtown Case (1874), 2 O'M. & H. 215, 223, followed.

- (2) That ballot papers not stamped by the returning officer in the manner required by sec. 71(2) of the Act, though marked by voters and deposited, should not be counted: the provision is imperative; and the saving section, 114, does not apply to the returning officer.

The Thornbury Case, Ackers v. Howard (1886), 16 Q.B.D. 739, distinguished.

Review of the authorities on the question whether a statutory provision is imperative or merely directory.

- (3) That a ballot paper on which were two marks in the form of a T, the two lines not touching, should not be counted.
- (4) That a ballot marked √, the rest of the cross being apparently torn off, should be counted.
- (5) That a ballot paper with the word "for" written after the cross should be counted.
- (6) That a ballot paper properly marked for one of the candidates, but with a cross on the back opposite the deputy returning officer's initials, should be counted.
- (7) That a ballot paper marked for both candidates, with a mark on the cross opposite the name of one, perhaps intended as an erasure, should not be counted.

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- (8) That a ballot paper marked with a plain cross, not coloured with pencil or ink, probably made with a worn and defective pencil, should be counted.
- (9) That, where the poll book in a subdivision shewed that only 200 ballot papers were issued, but 201 ballot papers properly marked were found in the box, they should all be counted: in a recount the ballot is to be looked at and not the poll book.
- (10) That a ballot paper marked with a cross to the right of the name of one of the candidates, with some irregular pencil markings under his name, should be counted, none of the markings being such as to identify the voter.
- (11) That a ballot paper marked with two strokes, the second a repetition of the first, but not quite covering it, not amounting to either a V or a cross, should not be counted.
- (12) That a ballot paper marked with two crosses, one opposite the name of each candidate, should not be counted, although one cross was somewhat paler than the other.
- (13) That a ballot paper marked with a cross opposite the name of one candidate, and a line, apparently marked out, opposite the name of the other, should be counted for the first.
- (14) That a ballot paper marked with a cross containing three strokes in the centre of the name of one of the candidates, should be counted. This paper was returned by the deputy returning officer as a declined ballot; but the ballot is to be looked at and not the return: see form 21 and secs. 117 and 138 of the Act.
- (15) That a ballot paper marked with a cross, but having the figures 83 before the deputy returning officer's initials on the back, should be counted.
- (16) That ballot papers having no cross upon their face but a cross on the back should not be counted.
- (17) That a ballot paper marked with a straight line instead of a cross should not be counted.
- (18) That a ballot paper marked with a cross and a further line making a star should be counted.
- (19) That a ballot paper marked with a cross opposite the name of one of the candidates, with a straight line in pencil under part of his name, should be counted.

THE candidates at an election of a member of the Legislative Assembly of Ontario for the electoral district of South Oxford were Thomas Richard Mayberry and Victor A. Sinclair.

A recount of the ballots cast was held by the Deputy Judge of the County Court of the County of Oxford, J. G. Wallace, Esquire, K.C.

Both candidates appealed from the decision of the Judge upon the recount.

The appeals were heard by CLUTE, J., as a Judge of a Divisional Court of the Appellate Division of the Supreme Court of Ontario, pursuant to the Ontario Election Act, R.S.O. 1914, ch. 8, sec. 144.

R. McKay, K.C., for Mayberry.

E. Bristol, K.C., for Sinclair.

August 11. CLUTE, J.:—Both parties appeal from the recount before His Honour J. G. Wallace, Deputy Judge of the County of Oxford.

Upon the recount before His Honour, it was agreed by counsel that the votes properly cast for Sinclair were 2,569 and that the votes properly cast for Mayberry were 2,566.

Appeal was taken on 47 ballots referred to in His Honour's judgment as exhibits Nos. 1 to 47 inclusive. Out of these ballots he allowed Sinclair 17, which added to 2,569 agreed upon by counsel makes 2,586 ballots which he finds properly cast for Sinclair; and out of the said ballots he allowed Mayberry 15, which added to 2,566 agreed upon by counsel, makes 2,581 which he finds were properly cast for Mayberry, leaving a majority in favour of Sinclair of 5: 13 of the 47 ballots were disallowed, 1 ballot declined, and no change was made in exhibit No. 30, which accounts for the 47 before referred to.

I shall deal with the Mayberry appeal first.

In the notice of appeal, "re objection 1," etc., corresponds with the number of the exhibit as filed on the recount before the County Court Judge and as produced before me.

Exhibit 1. Ballot marked in ink for Sinclair. It is claimed that this vote should not be counted; that sec. 102 of the present Election Act, R.S.O. 1914, ch. 8, directs that the ballot shall be marked with a black lead pencil, and that this direction is not directory but imperative. The section directs that the voter, on receiving his ballot, shall forthwith proceed into one of the compartments of the polling place, and there mark his ballot, "making a cross with a black lead pencil within the white space containing the name of the candidate," etc. I cannot yield to this contention. It does not say that he *shall* make a cross with a black lead pencil. The section further provides that, having marked the ballot, the voter "shall then fold the ballot paper," etc., "so that the initials and stamp on the back of it and the number on the counterfoil can be seen without opening it, and hand it to the deputy returning officer, who shall, without unfolding it," etc.

I do not think it can be successfully argued that a fault in folding a paper or unfolding it or examining the initials should

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vitiating a ballot paper, as would be the case if the word "shall" is to bear the meaning contended for throughout the section. Nor should, in my opinion, such effect be given in regard to the use of the pencil.

Reference was made to the *Monck Case* (1876), H.E.C. 725, 734. A number of objections are there referred to; none covering this case; sec. 114 declares what ballot papers are to be rejected in counting the votes, namely, (a) which have not been supplied by him (the deputy returning officer), or (b) by which votes have been given for more candidates than are to be elected; or (c) upon which there is any writing or mark by which the voter can be identified; "but no word, letter or mark written or made or omitted to be written or made by the deputy returning officer on a ballot paper, shall avoid the same or warrant its rejection." In the *Wigtown Case* (1874), 2 O'M. & H. 215, Lord Neaves, at p. 223, says: "I think that it is not essential that the cross should be made with pencil. The directions, indeed, contain this paragraph . . . that the voter will take the pencil in the compartment and mark his vote; but this is not a substantive enactment, and is not expressed in imperative words." So here, I do not think the words "with a black lead pencil," in the phrase "making a cross with a black lead pencil," are imperative. See also the *Berwick-on-Tweed Case* (1880), 3 O'M. & H. 178, 180.

This objection fails.

Objections 6, 8, 16, in the notice of appeal, correspond to *exhibits* 19, 20, 23, 38, 39. These also are cases of the ballot being marked with ink instead of pencil, and also fail.

Exhibits 6, 11, 12, and 22. The question here raised is as to the validity of a ballot not stamped by the returning officer under sec. 71(2), and affects four ballots which have been counted for Mr. Sinclair, viz., 6, 11, 12, and 22, and two ballots which have been counted for Mr. Mayberry.

The respondent relied on the *Thornbury Case*, *Ackers v. Howard* (1886), 16 Q.B.D. 739. The trial Judges, Field and Day, JJ., stated the following case: "It was proved before us that the returning officer had at the counting of the poll, after objection taken and considered, counted 224 ballot papers for the

respondent, and 49 ballot papers for the petitioner, which had been delivered to the voters respectively by the presiding officer, the same not having been marked upon the face with the official mark required by the Ballot Act. Upon argument we affirmed such decision of the returning officer. . . . The question for the opinion of the Court being whether we were right in so holding." The question arose under the English Ballot Act, 1872, sec. 2(1), which provides that "the ballot paper shall be marked on both sides with an official mark." The ballot papers, the validity of which were in question, were only so marked on the back. The same section also provides that "any ballot paper which has not on its back the official mark . . . shall be void and not counted." This part of the section did not apply because the ballot papers had on their backs the official mark. The Court affirmed the decision of the Election Judges holding that the votes were good. Hawkins, J., who delivered the judgment of the Court, after reviewing the requirements of the Act, referring to *Pickering v. James* (1873), L.R. 8 C.P. 489, in which the Court were evenly divided, adopted the view of Keating and Brett, JJ., who held it to be the duty of the presiding officer to look at the ballot paper of a voter to see that it is marked with the official mark before it is placed in the box. But, while taking this view, it was pointed out that it was not necessary for the decision of the case before them: "In this case the question is not whether the presiding officer, or those to whom the conduct of the election was intrusted, have in all respects discharged the duty cast upon them, but whether by reason simply of the omission to stamp the ballot papers on the faces (the marks on the back being admittedly regular), the voters have lost their votes. We are of opinion they have not. They have, in our opinion, complied with every requirement of the statute and the rules, and have strictly followed the directions prescribed in schedule 2 for their guidance. Having done this, to hold that their votes are void by reason of an omission not pointed out as material either by statute, rules, or directions, would be to hold that the statute, rules, and directions were but false misleading guides to the observance of the obligations enjoined by law; this we are not prepared to do. If the Legislature had intended that the

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absence of the official mark from the face of the ballot paper should avoid the vote, it is impossible to suppose that in declaring in the second section what votes shall be void and not counted, it would have confined itself to the absence of the mark on the back. It would be difficult to suggest a case to which the maxim so often quoted during the argument, '*Expressio unius est exclusio alterius*,' could be more justly and fittingly applied."

It will be seen that the *Ackers* case, while instructive, does not cover the point here in question. What the decision would have been in the absence of the official mark upon the back of the ballot papers and in the absence of the clause declaring that "any ballot paper which has not on its back the official mark . . . shall be void and not counted," it is impossible to say; but that is the question here involved.

Section 114 directs the deputy returning officer to "reject all ballot papers . . . (a) which have not been supplied by him . . . but no word, letter or mark written or made or omitted to be written or made by the deputy returning officer on a ballot paper, shall avoid the same or warrant its rejection." The last clause does not cure the defect here, as, under sec. 71(2), it is the returning officer, and not his deputy, that is required to stamp every ballot paper "with a stamp furnished to him for that purpose by the Clerk of the Crown in Chancery, the impression of the stamp being so placed on the ballot paper that, when the ballot is folded by a voter, the impression can be seen without the ballot paper being opened." This enables the deputy returning officer to see that the ballot paper is official.

By sec. 98, the voter shall receive from the deputy returning officer a ballot paper on the back of which the deputy returning officer has previously put his initials so placed as directed in Form 12 that when the ballot is folded his initials can be seen without opening it, and on the back of the counterfoil of which he has placed a number corresponding to that placed opposite the voter's name in the poll book.

By sec. 102, the voter, after making his mark, shall so fold the ballot paper *that the initials and stamp* on the back of it *and the number on the counterfoil* can be seen without opening it, and hand it to the deputy returning officer, *who shall, without*

unfolding it, ascertain, by examining his initials, and the stamp and the number on the counterfoil, that it is the same ballot paper that he furnished to the voter, and shall then, in view of all present, including the voter, remove the counterfoil and . . . destroy it and place the ballot paper in the ballot box.

Form 12, referred to in sec. 98, indicates on the back of the ballot paper the place where the initials of the deputy returning officer and the stamp of the returning officer and the number on the counterfoil are to be placed, so that when folded by the voter the deputy returning officer may identify the ballot paper by the initials, stamp, and counterfoil, as required by sec. 102.

The question here then is quite different from that decided in the *Ackers* case. It is, whether a ballot paper not duly stamped by the returning officer is a ballot paper within the meaning of the Act?

Under sec. 71 (1) and (2), every ballot paper furnished by the returning officer to his deputy shall be stamped with the stamp furnished by the Clerk of the Crown in Chancery. Is this peremptory and imperative?

“Shall” shall be construed as imperative: the Interpretation Act, R.S.O. 1914, ch. 1, sec. 29 (cc); *Hunt v. Wimbledon Local Board* (1878), 4 C.P.D. 48, approved in *Young v. Mayor, etc., of Leamington* (1883), 8 App. Cas. 517, at p. 522, where Lord Blackburn quotes with approval the judgment of Lindley, L.J., in the Court of Appeal in the same case (1882), 8 Q.B.D. 579, 585; *Hoare v. Kingsbury Urban District Council*, [1912] 2 Ch. 452, at p. 466.

The object of the Act is to secure complete secrecy in voting. The counterfoil is destroyed as soon as the deputy returning officer identifies the number of it with the number opposite the voter's name. The clause requiring the official stamp prevents fraud and gives security to those having the right to vote by ensuring the use only of ballots issued by the returning officer, the identity of which shall be certified by the official seal furnished by the Clerk of the Crown in Chancery stamped on each ballot.

To permit ballot papers not so stamped to be used would, in the language of Lindley, L.J., approved by Lord Blackburn in the *Young* case, “in effect be repealing the Act of Parliament.”

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and would deprive the public of that protection which Parliament intended to secure for them.

In my opinion, no ballot paper may be used which is not stamped by the returning officer, as upon a recount such ballot can only be identified by the official stamp. Without such stamp it is discredited, and the failure of the voter or deputy returning officer to observe the defect does not cure it. The initials and number on the counterfoil, being wrongly placed there, cannot give it validity, nor do they help to identify it as issued by the returning officer.

The curative section, 114, applies only to the deputy returning officer, and does not and was not intended to apply to the returning officer. On the contrary, if the Legislature had intended that the absence from the ballot paper of the official stamp to be placed there by the returning officer should not avoid the vote, it is impossible to suppose that the part of sec. 114 covering the acts of omission and commission of the deputy returning officer would not have been extended to the returning officer. The deputy returning officer is brought within, and the returning officer is excluded from, the operation of the curative clause, 114. This evidences a clear intention of the Legislature to regard the mandatory direction to the returning officer as imperative. As was said by Hawkins, J., in the *Ackers* case: "It would be difficult to suggest a case to which the maxim . . . '*expressio unius est exclusio alterius*,' could be more justly and fittingly applied." This maxim is specially applicable when applied to the interpretation of a statute: Broom's Legal Maxims, 7th ed., p. 501; *The Queen v. Caledonian R.W. Co.* (1850), 16 Q.B. 19, 31; *Watkins v. Great Northern R.W. Co.* (1851), 16 Q.B. 961, referred to in *Caledonian R.W. Co. v. Colt* (1860), 3 Macq. H.L. Sc. 833, at p. 839; *Edinburgh and Glasgow R.W. Co. v. Linlithgow Magistrates* (1859), 3 Macq. H.L. Sc. 691, at pp. 717, 730; Maxwell on the Interpretation of Statutes, 5th ed., pp. 504, 529; Craies' Statute Law, 20th ed., p. 249 (b). "Express enactment shuts the door to further implication:" *per* Lord Dunedin in *Whiteman v. Sadler*, [1910] A.C. 514, 527. "If there be any one rule of law clearer than another . . ." said the Judicial Committee in *Blackburn v. Flavelle* (1881), 6 App. Cas. 628, 634,

“it is this: that where the Legislature . . . have expressly authorised one or more particular modes of . . . dealing with property, such expressions always exclude any other mode, except as specifically authorised.” See also *Hamilton v. Baker* (1889), 14 App. Cas. 209, 217. The difference between what is called an absolute enactment and a directory enactment is explained in *Woodward v. Sarsons* (1875), L.R. 10 C.P. 733, 746: “An absolute enactment must be obeyed or fulfilled exactly, but it is sufficient if a directory enactment be obeyed or fulfilled substantially.” If an absolute enactment is neglected, the thing being done is invalid and void, but, if the enactment is merely directory, it is immaterial, so far as relates to the validity of the thing which is being done, whether it is complied with or not: Craies’ Statute Law, p. 249; *Bowman v. Blyth* (1856), 7 E. & B. 26, at p. 45; *Rex v. Loxdale* (1758), 1 Burr. 445; *Cubitt v. Maxse* (1873), L.R. 8 C.P. 704, 715; *Thwaites v. Wilding* (1883), 12 Q.B.D. 4.

In the above cases the statutes were held to be absolute and imperative.

A case of a statute being directory merely is that of *Regina v. Lofthouse* (1866), L.R. 1 Q.B. 433, where a statute enacted, for the purpose of electing a local board of health, that “the chairman shall cause voting papers, in the form in schedule A” to be distributed to the voters. The voting papers were not in the precise form given in the schedule A, as the column for the number of votes was left in blank. Held, that this omission did not vitiate the voting papers.

There seems to be no general rule as to when enabling Acts are absolute and when directory. “It is the duty of the Courts of justice to try to get at the real intention of the Legislature, by carefully attending to the whole scope of the statute to be construed:” *per* Lord Campbell in *Liverpool Borough Bank v. Turner* (1860), 30 L.J. Ch. 379, 380. Lord Penzance, in *Howard v. Bodington* (1877), 2 P.D. 203, 211, after referring to this dictum of Lord Campbell, said: “I believe, as far as any rule is concerned, you cannot safely go further than that in each case you must look to the subject-matter; consider the importance of the provision . . . and the relation of that provision to the

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general object intended to be secured by the Act; and upon a review of the case in that aspect decide whether the enactment is what is called imperative or only directory.”

Having regard to the object of the Act, the importance of the provision, and its necessity to reach that object, I am of opinion that sec. 71(2) is imperative and absolute, and that non-compliance therewith renders the ballot paper void, and it is not to be counted on a scrutiny. This affects the ballot papers Nos. 6, 11, 12, and 22 cast for Sinclair, and these should be disallowed and deducted from his total, and applies also to ballot papers Nos. 17 and 10 cast for Mayberry, which are also void and should be deducted from his total.

Exhibit 14. This ballot paper was disallowed. On this ballot there were two marks in the form of a T, and it was contended that the lines touched, and that under the cases—the *Wigtown Case*, 2 O’M. & H. 215; *Re North Grey* (1902), 4 O. L.R. 286; the *Cirencester Case* (1893), Day’s Election Cases (Judgments) 155; and the *Bothwell Case* (1884), 8 S.C.R. 676, where it was held that a ballot marked with a “B” was sufficient—it was sufficiently marked. I think this ballot paper was properly disallowed, as I think the lines do not touch each other. This objection fails.

Exhibit 15. This ballot shews a V, the balance apparently being torn off. I think it was properly counted for Sinclair. See the last case and *In re Halton Election* (1902), 4 O.L.R. 345.

Exhibit 24. This ballot has the word “for” written after the cross. I do not think this voids the ballot. See *Woodward v. Sarsons*, L.R. 10 C.P. 733; the *Lennox Case* (1902), 4 O.L.R. 378; *Re North Grey*, 4 O.L.R. 286; the *West Huron Case* (1898), 2 Ont. Elec. Cas. 58; *Jenkins v. Brecken* (1883), 7 S.C.R. 247.

Exhibit 25. This ballot is properly marked for Sinclair, but on the back there is a cross opposite the deputy returning officer’s initials. I do not think this vitiates the ballot. There can be no doubt for whom the ballot was marked. The objection fails.

Exhibit 26. This ballot is marked both for Mayberry and Sinclair, but it is contended that, inasmuch as there is an addi-

tional line in the Sinclair cross, this is evidence that the voter intended to erase the Sinclair cross, leaving the ballot marked for Mayberry. I do not think so. I think the test is: if there was no cross for Mayberry, would there be a good cross for Sinclair? Answering this in the affirmative, the effect of the ballot was destroyed by marking it for both candidates. Dismissed.

Exhibit 28. Here the ballot is clearly marked with a plain cross for Mayberry, but the cross is not coloured either with pencil or ink: it was probably made with a worn and defective pencil which did not give it colour. In a reference to the *Cirencester Case (Re Lawson)*, in Day's Election Cases (Points of Law and Practice), p. 60, it is said that a vote was rejected by the returning officer, but held by the Court to be good for Lawson, where the voter had indented, probably with a finger-nail, a cross immediately to the left of the word "Lawson." This indentation was apparent only upon close examination and cannot conveniently be reproduced. See the *Berwick-on-Tweed Case*, 3 O'M. & H. at p. 181. I think this ballot should have been counted for Mayberry, and the appeal in this case is allowed.

Exhibit 30. In this case it is not disputed that there were 201 ballots properly marked, of which 87 were marked for Mayberry, but only 86 have been counted for him. His Honour makes the following statement: "Ingersoll, Division No. 1, exhibit 30. Mayberry envelope contained 87 ballots. Sinclair envelope contained 114 ballots. The deputy returning officer's return shewed 86 ballots for Mayberry and 114 for Sinclair, in all 200. I was asked to settle the discrepancy by reference to the poll book, and, when the poll book was produced, I found that it shewed that only 200 had voted. The stub of the book containing the ballots shewed one unnumbered stub between the numbers 5552 and 5553. It is quite possible that the ballot taken from the unnumbered stub may have been stuck to one of the ballots next it, and the voter may have been handed two ballots and may have put a cross on each. I fail to see any reason why I should assume that there was an extra ballot in this polling subdivision for Mr. Mayberry. Taking the return and the poll book together, I see no reason for adding a ballot to Mr. Mayberry's count."

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In my view, in a recount the ballot is to be looked at and not the poll book. One may surmise how the discrepancy between the number of ballots and the entry made by the officer occurred, but the ballot, being properly marked, should be allowed. Appeal allowed.

Exhibit 31. A cross for Sinclair to the right of his name, with some irregular pencil markings under his name. I agree with the Deputy County Court Judge, and do not think any of the markings are such as to identify the voter. I do not think it falls within the *Lennox Case*, 4 O.L.R. 378, 380, as contended for by Mr. McKay.

Exhibit 34. It is contended that the stroke here amounts to a V, and that under the cases the ballot should have been counted for Mayberry. I do not think so. The most that can be said is that a single stroke has been repeated, not quite covering the first stroke. It does not amount to either a V or a cross. It was properly disallowed. Appeal fails.

Exhibit 44. In this case the ballot is clearly marked for each candidate, although the cross opposite Sinclair's name is somewhat paler than that for Mayberry. This ballot was properly disallowed. See *In re Halton Election*, 4 O.L.R. at p. 347 (6), where this point is covered.

The result is that all the appeals on behalf of Mayberry are dismissed except No. 12, ballot 28, and No. 13, ballot 30, which are allowed to be added to Mayberry's total, and ballots 6, 11, 12, and 22, which are to be deducted from Sinclair's total.

Then as to Sinclair's appeal.

Exhibits 17 and 10. Appeal allowed. Already dealt with.

Exhibit 18. I think this is properly allowed to Mayberry. There is a cross for Mayberry and a straight line opposite Sinclair's name apparently marked out, thus /. This vote was counted by the returning officer and allowed by the County Court Judge. I think it was properly allowed. Dismissed.

Exhibit 21. The return of the deputy returning officer shews one declined ballot. It is marked with a cross, containing three strokes in the centre of Mayberry's name, thus: Thomas R. May X₃berry. His Honour says: "This should not have been counted as a declined ballot. I think the deputy returning

officer intended to count it a rejected ballot." In this I agree with His Honour. It was argued that, because it was returned in form 21, it ought not to be counted, although sufficiently marked; but sec. 117 refers to this return, and sec. 138 provides that the form may be corrected. Even without this clause, I should hold that the ballot is to be looked at, and not the return. This appeal is dismissed.

Exhibit 27. Cross for Mayberry, with the figures 93 before the deputy returning officer's initials on the back. Counted by the deputy returning officer for Mayberry, and allowed by the Deputy County Court Judge, and I think properly allowed by him. Appeal dismissed.

Exhibits 33 and 42. These ballots have no cross upon their face but a cross upon the back. They were both disallowed, and I think properly so. Appeal dismissed.

Exhibit 36. Straight line for Sinclair, counted by the deputy returning officer for Sinclair, and disallowed by the Deputy County Court Judge. I think this ballot was properly disallowed. See the *Halton Case*, 4 O.L.R. 345, where an error in the head-note in the *West Huron Case*, 2 Ont. Elec. Cas. 58, is pointed out, in which it is stated that ballots so marked in that case were "allowed." It should have been "disallowed."

Exhibit 37. In this case there was a cross and a further line making a star, thus ★ for Mayberry. This was rejected by the deputy returning officer and allowed by the Deputy County Court Judge. On the cases above referred to, I think the ballot was properly allowed. Appeal dismissed.

Exhibit 41. The return by the deputy returning officer shews one declined ballot. This ballot is marked with a straight line for Sinclair. His Honour held that it should have been returned as a rejected ballot, and it was disallowed by him. With this I agree. Appeal dismissed.

Exhibit 43. A cross for Mayberry with a straight line in pencil mark under part of his name. It was counted for Mayberry by the deputy returning officer, and was allowed by the Deputy County Court Judge, and properly so, I think. This appeal is dismissed.

Exhibit 47. A straight line for Sinclair; counted for Sinclair

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by the deputy returning officer, and properly disallowed by His Honour.

The result is, that on Mr. Mayberry's appeal 2 votes are to be added to his total of 2,581, and 4 are to be deducted from Mr. Sinclair's total of 2,586, and all the other objections taken by Mr. Mayberry are dismissed.

On Mr. Sinclair's appeal 2 votes are to be deducted from Mr. Mayberry's total of 2,583. That is, 2 votes are added and 2 votes are deducted from Mr. Mayberry's total of 2,581, leaving that total, as found by the Deputy County Court Judge, unaltered, and 4 votes are to be deducted from Mr. Sinclair's total of 2,586 as found by the said Deputy County Court Judge, leaving a total for Mr. Sinclair of 2,582. Thus leaving a majority in favour of Mr. Sinclair of one vote.

As each appeal has partly succeeded and partly failed, and one of the principal points involved was the non-compliance of the returning officer with the requirements of the statute, there should be no costs to either party.

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[HODGINS, J.A.]

BASSI V. SULLIVAN.

Alien Enemy—Right of Action in Time of War—Resident Alien "in Protection"—Qualifications—Royal Proclamation—Inquiry as to Conduct and Status of Alien Plaintiff—License—Stay of Action—Interim Injunction Restraining Sale under Chattel Mortgage—Qui tam Action—Simple Contract Creditor—Preference—Account—Dissolution of Injunction.

An alien enemy is one whose sovereign is at enmity with the Crown of England, and one of his disabilities is, that he cannot sue in a British Court during war. This rule, however, is relaxed in favour of an alien enemy who is "in protection" or "in the King's peace *pro hac vice*."

Wells v. Williams (1698), 1 Ld. Raym. 282, 1 Salk. 46, and *The Hoop* (1799), 1 C. Rob. 196, 201, followed.

The plaintiff, a native of Austria, resident in Ontario, but not naturalised, began this action at a time when a state of war existed between his Britannic Majesty and the Emperor of Austro-Hungary; and the defendants contended, upon an interlocutory motion made by the plaintiff, that the action was not maintainable and should be dismissed:—

Held, that the Court was bound to take notice of this point.

Janson v. Dreifontein Consolidated Mines Limited, [1902] A.C. 484, 499, followed.

The plaintiff relied upon the terms of a Royal Proclamation dated on the 15th August, 1914, which provided that all persons in Canada of German

or Austro-Hungarian nationality, so long as they quietly pursued their ordinary avocations and were not engaged in espionage or acts of a hostile nature, should be allowed the protection of the law:—

Quare, whether the words "the protection of the law" referred to anything more than police protection.

And *held*, that, as the Court had no means of knowing whether the Proclamation covered this particular plaintiff, the action should be stayed until the plaintiff should satisfy the Court that it ought to allow him to proceed to trial, and there urge the contention that he was in Canada under what amounted to a license sufficient to enable him to sue on such a cause of action as he was setting up.

The plaintiff's motion was to continue, till the trial, an interim injunction restraining the defendants from seizing and selling under a chattel mortgage the goods of a firm alleged to be indebted to the plaintiff. The plaintiff sued on behalf of himself and all other creditors of the firm; he did not allege insolvency; but grounded his action upon the allegation that the proposed seizure and sale would create an unjust preference.

Held, that a simple contract creditor, even suing in a class action, cannot invoke the aid of the Court to restrain a chattel mortgagee from realising upon his security, unless alleging more than this plaintiff alleged, without satisfying the Court that the circumstances indicated some infraction of the statutes relating to preferences; and the Court will not, upon such an application, take the account, nor restrain realisation by a solvent creditor upon his mortgage, except upon at least *prima facie* proof of invalidity.

The motion was, therefore, refused.

MOTION by the plaintiff for an order continuing till the trial an interlocutory injunction granted by a Local Judge.

September 3. The motion was heard by HODGINS, J.A., in the Weekly Court (High Court Division) at Toronto.

W. R. Smyth, K.C., for the plaintiff.

R. McKay, K.C., for the defendants.

September 11. HODGINS, J.A.:—The plaintiff, who holds an unregistered chattel mortgage, dated the 18th May, 1914, on the stock in trade of Wiwcaruk & Bassi, in the town of Cobalt, brings this action to set aside the defendants' registered chattel mortgage upon the same goods, dated the 29th May, 1914. He has obtained from the Local Judge at Haileybury an injunction restraining their sale. The present motion is to continue that injunction. The plaintiff claims to sue on behalf of himself and all other creditors of the firm already named, and grounds his action upon the fact that the seizure and sale will, in his belief, "create an unjust preference."

The plaintiff by so suing must be taken to have abandoned his

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rights as a secured creditor. Insolvency is not suggested except inferentially, and apparently will only arise after the defendants have realised upon their security.

I do not understand upon what principle a simple contract creditor, even suing in a class action, can restrain a chattel mortgagee from realising upon his security, unless he in the first place alleges more than this plaintiff does, and in the second place satisfies the Court that the circumstances under which the mortgage was given indicate some infraction of the statutes relating to preferences. This the plaintiff does not attempt to do.

So far as the amount due upon the mortgage is concerned, the Court will not, upon this application, take the account, nor, as I understand the practice, will it restrain realisation by a solvent creditor under his mortgage, except upon at all events *prima facie* proof of invalidity.

I am, therefore, unable to continue the injunction.

The defendants, however, contend that the action is not maintainable, and that I should dismiss it, because the plaintiff is an alien enemy, being an Austrian and not naturalised. The plaintiff does not deny that he is a native of Austria, and by his counsel admits that he is not naturalised. The writ was issued on the 27th August, 1914, which was after the date at which a state of war existed between his Britannic Majesty and the Emperor of Austro-Hungary, viz., the 12th August, 1914.

This raises a most important point, of which the Court is bound to take notice: *per* Lord Davey in *Janson v. Dreifontein Consolidated Mines Limited*, [1902] A.C. 484, at p. 499.

The position of an alien enemy has not, except in a few isolated cases, been dealt with in the Courts since the Napoleonic and Crimean wars. The doctrines then established have not, in consequence, undergone much, if any, modification. But if not altered in substance, the extreme rights arising thereout are rarely—according to Lord Loreburn in *De Jager v. Attorney-General of Natal*, [1907] A.C. 326—put into actual practice.

An alien enemy is one whose Sovereign is at enmity with the Crown of England, and one of his disabilities which has always been strongly insisted upon is, that he cannot sue in a British Court during war. But this rule is always stated with an excep-

tion. In *Wells v. Williams* (1698), 1 Ld. Raym. 282, 1 Salk. 46, Sir George Treby, Chief Justice of the Common Pleas (temp. Wm. III.) said: "An alien enemy, who is here in protection, may sue his bond or contract." And in the oft-quoted case of *The Hoop* (1799), 1 C. Rob. 196, 201, Sir William Scott laid it down that, even in British Courts of the law of nations, "no man can sue therein who is a subject of the enemy, unless under particular circumstances that *pro hâc vice* discharge him from the character of an enemy; such as his coming under a flag of truce, a cartel, a pass, or some other act of public authority that puts him in the King's peace *pro hâc vice*. But otherwise he is totally *exlex*."

This exception is recognised in more modern times by Sir Alexander Cockburn, L.C.J., in his work on Nationality (1869), p. 150: "An alien enemy has no civil rights in this country, unless he is here under a safe conduct or license from the Crown. In modern times, however, on declaring war, the Sovereign usually, in the proclamation of war, qualifies it by permitting the subjects of the enemy resident here to continue, so long as they peaceably demean themselves; and without doubt such persons are to be deemed alien friends."

But to the enjoyment of this privilege important qualifications are annexed. One is that the alien enemy must shew himself possessed of what amounts to such a license: *Esposito v. Bowden* (1857), 7 E. & B. 763, 793. And, further, if the license be a general one, the alien enemy may be prevented from asserting it. In *Sparenburgh v. Bannatyne* (1797), 1 B. & P. 163, at p. 170. Eyre, C.J., says: "I take the true ground upon which the plea of alien enemy has been allowed is, that a man professing himself hostile to this country, and in a state of war with it, cannot be heard if he sue for the benefit and protection of our laws in the Courts of this country."

The Crown has, by Royal Proclamation dated on the 15th August, 1914, directed: "That all persons in Canada of German or Austro-Hungarian nationality, so long as they quietly pursue their ordinary avocations, be allowed to continue to enjoy the protection of the law and be accorded the respect and consideration due to peaceful and law-abiding citizens; and that they be

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not arrested, detained, or interfered with, unless there is reasonable ground to believe that they are engaged in espionage, or engaging or attempting to engage in acts of a hostile nature, or are giving or attempting to give information to the enemy, or unless they otherwise contravene any law, order in council, or proclamation.”

In the present case the Court has no means of knowing whether this Proclamation, the terms of which are relied on as giving a right to maintain this action, covers this particular plaintiff. He may or may not be quietly pursuing his ordinary avocation, or he may be, for all that is before me, one of the class excluded by its subsequent provisions, or otherwise disentitled to take advantage of provisions intended for those who have resided here and engaged in business for some length of time. Nor am I at all sure that the Proclamation has the effect contended for. It appears to have been issued under sec. 6, sub-sec. (b), rather than under sub-secs. (e) and (f), of the War Measures Act, 1914, and may well refer only to police protection. It is not incumbent on the Court to make, still less to act upon, any presumption in favour of natives of either of the two nations now at war with the British Crown; and I think every facility should be afforded for local inquiry, so that the Court should be fully informed as to whether or not the plaintiff is in fact entitled to set up the protection extended by the Crown under the wording of the Proclamation. Such an inquiry may properly be made at or before the trial, and may be called for at any time on motion; but, if pleadings had been delivered in this case, I should prefer to leave the questions both of fact and law to be determined when the case came up for trial, especially as recent English statutes and proclamations have not yet reached this country. But, as attention is pointedly called to it on this motion, and as the Crown has drawn a distinction between peaceable alien enemies and those who may be otherwise engaged, I think, at this early stage of the war, it will be proper to stay the action until the plaintiff satisfies the Court that it ought to allow him to proceed to trial, and there urge the contention that he is here under what amounts to a license sufficient to enable him to sue on such a cause of action as he is setting up.

Reference to recent discussions in the English law periodicals and to the report of an expert committee of the London Chamber of Commerce in August may be of use on finally determining the extent of the Proclamation and the scope of its provisions.

The injunction will be dissolved and the action stayed meantime, with leave to apply on notice to a Judge of the High Court to permit the action to proceed after time has been given to make the inquiries I have indicated. Two weeks will be sufficient. If the action proceeds, the costs of this motion will be to the defendants in the cause, unless the trial Judge otherwise orders. If no further proceedings are taken, the costs will be paid by the plaintiff to the defendants after taxation.

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MURPHY V. LAMPHIER.

Sept. 21.

*Will—Action to Establish—Evidence—Onus—Testamentary Capacity—
Finding of Trial Judge against Will Propounded by Plaintiffs as Executors—Costs—Discretion—Appeal.*

The judgment of BOYD, C., 31 O.L.R. 287, was affirmed on appeal, the Court agreeing with his reasoning and his conclusion that the plaintiffs had failed to satisfy the onus that rested upon them of establishing the testamentary capacity of the testatrix.

It was also *held*, that, as the costs are left to the discretion of the trial Judge, the Court had no power to interfere with the exercise of that discretion, the appeal having in other respects failed, and no leave having been given by the Chancellor to appeal as to costs.

APPEAL by the plaintiffs from the judgment of BOYD, C., 31 O.L.R. 287.

June 8 and 9. The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A.

J. G. O'Donoghue, for the appellants, argued that, upon the whole facts of the case, the testamentary capacity of the deceased was well-established. He referred to *Laramée v. Ferron* (1909), 41 S.C.R. 391, affirming the judgment of the Quebec Court of King's Bench, Q.R. 17 K.B. 215; *Badenach v. Inglis* (1913), 29 O.L.R. 165, 192; *McIntee v. McIntee* (1910), 22 O.

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L.R. 241; *Skinner v. Farquharson* (1902), 32 S.C.R. 58; *Minister and Members of St. Andrews Church v. Brodie* (1905), Q.R. 14 K.B. 149.

J. W. Bain, K.C., and A. Ogden, for the defendants, the respondents, discussed the evidence and relied upon the reasons given by the learned Chancellor in his judgment at the trial and the cases cited therein.

O'Donoghue, in reply.

September 21. The judgment of the Court was delivered by MEREDITH, C.J.O.:—This is an appeal by the plaintiffs from the judgment dated the 18th April, 1914, of the Chancellor, after the trial of the action before him sitting without a jury at Toronto on the 4th, 10th, 16th, 17th, 18th, and 19th days of March, 1914.

The appellants propounded in the Surrogate Court of the County of Peel as the last will and testament of Jane Lamphier, deceased, a paper writing dated the 25th May, 1912, and the proceedings in that Court were removed into the Supreme Court.

By the judgment in appeal it is declared, ordered, and adjudged that this paper writing is not the last will and testament of the deceased.

In his reasons for judgment the learned Chancellor has carefully and elaborately reviewed the evidence on both sides; and the able argument of the learned counsel for the appellants has failed to satisfy me that the conclusions reached by the Chancellor are wrong.

Agreeing, as we do, with the reasoning of the Chancellor and his conclusion that the appellants failed to satisfy the onus which rested upon them of establishing the testamentary capacity of the deceased, it would serve no good purpose to review the evidence or to discuss the grounds of the decision.

The learned counsel for the appellants pointed out one or two errors in the Chancellor's statement of the facts, but they are unimportant and in no way affect the soundness of his conclusions upon the facts.

The appellants complain of the disposition which was made of the costs by the learned Chancellor; but, as the costs are left to the discretion of the trial Judge, this Court, according to the practice, has no power to interfere with the exercise of that discretion, as the appeal in other respects fails, and no leave was given by the learned Chancellor to appeal as to the costs.

During the argument counsel for the respondents expressed his willingness to pay \$500 towards the costs of the appellants; and, if an arrangement is made that that shall be done, the Court will approve of it, and if there is power to make such a direction the order dismissing the appeal may provide for payment of the agreed amount out of the estate of the deceased.

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CITY OF TORONTO V. CONSUMERS GAS CO.

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Municipal Corporation—Construction of Sewer in Highway—Necessary Lowering of Gas Pipes—Expense Incurred—Liability for—Rights of Gas Company in Soil—11 Vict. ch. 14—Injurious Affection of Land—Right to Compensation—Municipal Act, R.S.O. 1914, ch. 192, sec. 325.

Expense incurred by the city corporation in lowering a gas main belonging to the gas company, laid in one of the city highways—such lowering being necessitated by the construction by the city corporation, in the public interest, of a sewer—was held not to be recoverable from the company: the soil occupied by the pipes of the company was land taken and held by the company under the provisions of its Act of incorporation, 11 Vict. ch. 14; that land was injuriously affected by the exercise of the power of the city corporation in the construction of the sewer; the company was entitled to compensation for the damages necessarily resulting from the exercise of that power (sec. 325 of the Municipal Act, R.S.O. 1914, ch. 192); and, therefore, the company could not be required to repay to the city corporation the expense incurred.

Consumers Gas Co. v. City of Toronto (1897), 27 S.C.R. 453, followed. Judgment of the County Court of the County of York reversed.

APPEAL by the defendant company from the judgment of the Senior Judge of the County Court of the County of York, in an action brought in that Court and tried without a jury, in favour of the Corporation of the City of Toronto, the plaintiff (respondent).

The action was brought to recover the expense incurred by the plaintiff corporation in lowering a 20-inch gas main, belong-

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ing to the defendant company, laid on one of the public highways of the city—the lowering becoming necessary by reason of the construction of a sewer.

May 21. The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A.

I. F. Hellmuth, K.C., and *W. B. Milliken*, for the appellant company, argued that the Act incorporating the company, 11 Vict. ch. 14, operated as a grant to the company of the land in which their pipes were laid: *Consumers Gas Co. v. City of Toronto* (1897), 27 S.C.R. 453. By this Act the company has the freehold of the land in which the sewers are laid, and under sec. 325 of the Municipal Act is entitled to compensation. The learned trial Judge proceeded on American cases which do not affect the position of the company. Reference to *Southwark and Vauxhall Water Co. v. Wandsworth Board of Works*, [1898] 2 Ch. 603, and *Geddis v. Proprietors of Bann Reservoir* (1878), 3 App. Cas. 430, cited in the *Southwark* case at p. 608. Even if the company has not the freehold, it has at least some rights in the land under the Public Utilities Act, R.S.O. 1914, ch. 204, sec. 47, in respect of which it is entitled to compensation. The word “person” in sec. 47 may be applied to the respondent corporation: Interpretation Act, R.S.O. 1914, ch. 1, sec. 29 (x).

G. R. Geary, K.C., for the respondent corporation, argued that English assessment cases were distinguishable from the case at bar. The appellant company was only owner of property affixed to land. He referred to the judgment of Strong, C.J., in the case in 27 S.C.R. 453. There is here no question of a legislative grant or a grant in fee. Section 13 of 11 Vict. ch. 14 is explained as referring to the right of the company, if they are moved from one place, to put their pipes in another. The *Southwark* case may be distinguished on the facts, as the company here makes no payment, and the *Geddis* case is distinguishable as referring merely to reasonable use. He referred to *Gas Light and Coke Co. v. Vestry of St. Mary Abbott's, Kensington* (1885), 15 Q.B.D. 1; Dillon on Municipal Corporations,

5th ed., vol. 3, paras. 1269, 1271, and also paras. 1015, 1016; *New Orleans Gas Light Co. v. Drainage Commission of New Orleans* (1905), 197 U.S. 453; *Chicago Burlington and Quincy R. W. Co. v. State of Illinois* (1906), 200 U.S. 561; *National Water Works Co. v. City of Kansas* (1886), 28 Fed. Repr. 921, where the slaughter-house cases are referred to; *Belfast Water Co. v. City of Belfast* (1898), 92 Maine 52; *In re Deering* (1883), 93 N.Y. 361.

Hellmuth, in reply.

September 21. The judgment of the Court was delivered by MEREDITH, C.J.O.:—This is an appeal by the defendant from the judgment of the County Court of the County of York dated the 5th March, 1914, pronounced by the Senior Judge of that Court, after the trial of the action before him sitting without a jury on the 22nd December, 1913.

The action is brought to recover the expense incurred by the respondent in lowering a 20-inch gas main belonging to the appellant laid on Eastern avenue, one of the public highways of the city of Toronto, at or near the intersection of that street with Carlaw avenue, another of the public highways of the city, which was necessitated by the construction by the respondent, in the public interest, of a sewer on Carlaw avenue.

It is conceded by the appellant that the lowering of the gas main was necessary to enable the sewer to be constructed, and that, if the appellant is liable to pay the expense incurred in lowering the gas main, the respondent is entitled to recover the amount sued for; and the action is really brought for the purpose of obtaining a judicial determination as to whether the cost of such a work is to be borne by the appellant or by the respondent.

When the appeal was opened, and the fact that the case is a test one was mentioned, it was suggested that it was undesirable that the parties should be concluded by a judgment of this Court from which there is no appeal, and it was agreed by counsel that the case should be treated as if the action had been removed into the Supreme Court of Ontario.

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If it were not for the decision of the Supreme Court of Canada in *Consumers Gas Co. v. City of Toronto*, 27 S.C.R. 453, and the provisions of sec. 325 of the Municipal Act, R.S.O. 1914, ch. 192, I should be inclined to agree with the conclusion of the learned Judge of the County Court. It was, however, held in that case that the soil occupied by the pipes of the appellant is land taken and held by the appellant under the provisions of its Act of incorporation (11 Vict. ch. 14); and by sec. 325 of the Municipal Act it is provided that "where land is expropriated for the purposes of a corporation, or is injuriously affected by the exercise of any of the powers of a corporation or of the council thereof, under the authority of this Act or under the authority of any general or special Act, unless it is otherwise expressly provided by such general or special Act, the corporation shall make due compensation to the owner for the land expropriated, or where it is injuriously affected by the exercise of such powers for the damages necessarily resulting therefrom. . . ."

The sewer in the laying down of which it became necessary to remove the pipes of the appellant was constructed under the authority of para. 7 of sec. 398 of the Municipal Act, which empowers the councils of all municipalities to pass by-laws "for constructing, maintaining, improving, repairing, widening, altering, diverting, and stopping drains, sewers or watercourses; providing an outlet for a sewer or establishing works or basins for the interception or purification of sewage; making all necessary connections therewith, and acquiring land in or adjacent to the municipality for any such purposes."

The land of the appellant, *i.e.*, the soil in which its pipes were laid, was injuriously affected by the exercise of the power of the respondent or its council in the construction of the sewer, the laying of which necessitated the removal of the pipes, and the appellant was entitled to compensation for the damages necessarily resulting from the exercise of that power, and it follows that the appellant cannot be required to repay to the respondent the expense incurred in taking up and relaying the pipes.

The appeal should be allowed with costs and the judgment appealed from reversed, and, in lieu of it, judgment should be entered dismissing the action with costs.

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ROBINSON v. VILLAGE OF HAVELOCK.

Mar. 14.
Sept. 21.

Negligence—Children Killed in Gravel-pit Owned by Municipal Corporation—Nuisance—Cause of Death—Duty of Corporation—Knowledge of Children's Resort to Pit—Knowledge of Teamster Employed by Corporation—Invitation—Allurement—Evidence—Findings of Jury.

The defendant, a village corporation, owned land just outside the village limits, abutting on a highway and unfenced, from which land it had taken out sand and gravel. The plaintiff's young children went into the pit or excavation thus formed, to play, and were killed by the fall upon them of a piece of impacted earth. L., a teamster, who was employed by the defendant and others to haul sand and gravel from the pit, had taken out a load earlier in the day on which the children were killed. L. knew that children were in the habit of resorting to the pit to play, but there was no evidence that the defendant or any of its officials knew. The plaintiff sought damages for the death of his children:—

Held, that the excavation made by the defendant constituted a nuisance; but there was no evidence which would warrant a finding that the nuisance was the cause of the children's death; and the plaintiff's right to recover must depend upon his establishing that the defendant owed a duty to the children which it failed to perform, and that their death was occasioned by that failure.

The jury found, *inter alia*: (1) that the plaintiff's children and other children resorted to the pit with the knowledge and permission of the defendant; (2) that, previous to the accident, the defendant had no knowledge, nor should it reasonably have known, that there was a likelihood of children being injured there; (3) that there was an invitation to the plaintiff's children to enter the pit; (7) that the death was caused by negligence; (8) that the negligence was the defendant's; (9) that it consisted in L. having dug the hole and left it unprotected. The other findings were favourable to the plaintiff, negating contributory negligence, etc.:—

Held, that the second finding was fatal to the plaintiff's case—even assuming that the third finding was warranted by the evidence.

Cooke v. Midland Great Western Railway of Ireland, [1909] A.C. 229, as explained by *Latham v. R. Johnson & Nephew Limited*, [1913] 1 K.B. 398, distinguished.

Held, also, that L.'s knowledge of the fact that children were in the habit of resorting to the gravel-pit was not notice to the defendant: L. was not an officer or servant of the defendant, and had neither oversight nor care of the pit intrusted to him.

Semble, referring to *Pedlar v. Toronto Power Co.* (1913-4), 29 O.L.R. 527, 30 O.L.R. 581, that, even if knowledge by the defendant were shewn, the plaintiff could not succeed.

Judgment of KELLY, J., reversed.

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ACTION under the Fatal Accidents Act against the Corporation of the Village of Havelock, to recover damages for the death of the plaintiff's three children, in the circumstances mentioned in the judgments.

February 24, 25, and 26. The action was tried before KELLY, J., and a jury, at Peterborough.

D. O'Connell and D. J. Lynch, for the plaintiff.

F. D. Kerr and V. J. McElderry, for the defendant corporation.

March 14. KELLY, J.:—An action for damages for the death of the plaintiff's three children, caused by falling sand and earth in a sand-pit on the defendant corporation's property.

The jury have found that these children and other children resorted to and played in this sand-pit with the knowledge and permission of the defendants; that there was an invitation to the plaintiff's children to use the sand-pit, and that they entered it directly from the highway; that, when they went to the pit on the day of the accident, there was the excavation or hole in which they were killed; that, previous to the accident, the defendant corporation did not have any knowledge and they could not reasonably have known that there was a likelihood of children being injured there; that there was no negligence on the part of the parents of the children or others in whose charge they were; that their death was not brought about or contributed to by any act of their own. There was evidence to go to the jury on which they reached these findings. The jury also found that the children's death was caused by the negligence of the defendant corporation, in Leeson having dug the hole in which the children were killed, and left it unprotected. The defendant corporation's land, in which was the sand-pit, adjoins the public highway, and counsel admitted that there was no fence between the two properties except for a short distance at one end.

According to the evidence, the place at which the children met their death was about 40 feet from the highway; one witness, who measured it, said it was 43 feet.

Leeson's relationship to the defendant corporation, as shewn by the evidence of the Reeve of the municipality, was this. The defendant corporation used considerable sand and gravel from this pit for its own purposes, and also sold gravel and sand from it to others. The Reeve says that Leeson did most of the hauling of the gravel from the pit; that he is employed by the defendant corporation when it needs him to draw gravel and sand; that he runs the snow-plough in the winter months, keeping the sidewalks clean; that he is paid by the day or by the hour for himself and his team for sand and gravel drawing, and by the trip for snow cleaning; and that he also draws sand from the pit for "outside parties." Of Leeson's duties with reference to these others, the Reeve says:—

"Q. What does he do in regard to collecting for that or charging for it? A. He does not collect any money for it.

"Q. What are his duties in that respect when he draws the sand and gravel for somebody else? A. Sometimes he reports to council; he is supposed to report to council, and then we charge for it. There is quite a bit of sand and gravel taken out—we have no record of it.

"Q. Then he is supposed to keep track of the gravel drawn from there by other people and send a report into the council? A. He usually tells.

"Q. Makes a report? A. He does not make out any written report, usually a verbal report.

"Q. Who collects? A. The council—usually a constable."

The Reeve also says that when outsiders wanted gravel from the pit they usually spoke to him (the Reeve) and one or two of the councillors, and that such persons employed whomever they chose to draw the gravel from the pit.

There was evidence that Leeson on the day of the accident was employed in drawing stone, tiles, etc., for the defendant corporation, and that, shortly before the accident happened, an outsider (Seabrooke) asked him to bring him a load of sand; this Leeson took from the place of the accident, and, while he was absent from the pit delivering it, the children met their death.

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It is contended for the defendant corporation that the negligence of Leeson, as found by the jury, is not negligence for which it is liable. Having regard to the proposition of law that a master is not civilly responsible for wrong done by his servant unless it be done in the course of or within the scope or sphere of his employment, there may be some doubt as to the liability of the defendant corporation for Leeson's act in this instance; but, taking into consideration the evidence of the relationship between them with respect to his employment and the services he performed for them, the evidence of his having taken sand from the place of the accident, and that there is no direct evidence of any other person but Leeson having drawn sand from the pit, and the evidence of the Reeve of what Leeson's duties were in relation to the dealing with outsiders who obtained material from the pit, I think a reasonable interpretation of the answers of the jury is, that they meant that Leeson's negligence in digging the hole and leaving it unprotected was committed in the course or within the scope of his employment; and, in that view, the defendant corporation is liable.

The plaintiff claimed in respect of the death of three children; the jury, in the case of the youngest, a child of less than three years old, negatived any damage. I am of opinion that the findings of the jury on the evidence submitted to them warrant me in directing judgment to be entered in the plaintiff's favour, which I do for the amount assessed, with costs.

The action is framed for the benefit of the plaintiff and his wife and surviving children.

In view of the circumstances of the family, it seems to me that the apportionment should be such as to give the wife much the greater portion of the amount awarded. Counsel may speak to me on the matter before I make the apportionment.

The defendant corporation appealed from the judgment of KELLY, J.

June 10 and 11. The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A.

F. D. Kerr, for the appellant corporation, referred to *Cooke v. Midland Great Western Railway of Ireland*, [1909] A.C. 229, relied on by the respondent, and argued that it was distinguishable from the case at bar. He also referred to *Latham v. R. Johnson & Nephew Limited*, [1913] 1 K.B. 398, 410, 416, 419; *Pedlar v. Toronto Power Co.* (1913), 29 O.L.R. 527; article on the "Turntable" Doctrine in 49 C.L.J., p. 600; *Barker v. Herbert*, [1911] 2 K.B. 633, 644; *Harrold v. Watney*, [1898] 2 Q.B. 320, 324; *Hounsell v. Smyth* (1860), 7 C.B.N.S. 731, 742 743.

D. O'Connell, for the respondent, argued that Leeson was a servant of the defendant corporation, and it was liable for his negligence. A higher duty was owed to a child than to an adult. He referred to the *Cooke* and *Latham* cases, *supra*; *Saunders v. City of Toronto* (1899), 26 A.R. 265. The evidence shewed that the defendant corporation was the owner of the pit, and that Leeson was its servant; and the finding negating knowledge was directed only to the knowledge of the members of the council, and is not fatal to the respondent's case.

Kerr, in reply, argued that the trial Judge did not find that Leeson was a servant of the defendant corporation, but considered that he was bound to do so by the findings of the jury, and referred to the *Cooke* case *supra*. at pp. 234, 235.

September 21. The judgment of the Court was delivered by MEREDITH, C.J.O.:—This is an appeal by the defendant from the judgment dated the 14th March, 1914, which Kelly, J., directed to be entered on the findings of the jury at the trial before him at Peterborough on the 24th, 25th, and 26th February, 1914.

The main facts are not in controversy and are as follows. The appellant is the owner of a gravel-pit situate just outside the village of Havelock; from it sand and gravel are taken for the purposes of the appellant, and are also allowed to be taken by the inhabitants of the village, on payment of the price fixed. A teamster named Leeson was employed by the appellant to haul the sand and gravel for it, and was paid by the day or hour

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while he was so employed. He also hauled sand and gravel for the inhabitants of the village, and, when employed in that work, was employed and paid by them. He kept for his own purposes an account of the loads hauled for the inhabitants, and sometimes reported verbally to the appellant the persons for whom the hauling had been done and the number of loads he had hauled, but he had no oversight or charge of the gravel-pit intrusted to him. The sand and gravel had been pretty nearly exhausted when the accident which resulted in the death of three of the children of the respondent, and gave rise to the action, happened. The result of the operations was, that the lot was excavated to a depth varying from four to twelve or thirteen feet, and the bottom of the excavation was somewhat uneven, and, according to the testimony of some of the witnesses, there were holes in it, caused by the digging out of the sand and gravel. The lot abutted on a main road, and there had at one time been a fence separating the lot from the road, but the fence had disappeared owing to the operations in the pit undermining it, and at the time of the accident and for a considerable period before then, the lot, except for a distance of about fifty or sixty feet, was unfenced on the road-side, and the road itself had been to some extent encroached upon by the excavation. A road leading from the highway into the pit was used in hauling the sand and gravel. There had at one time been another road into the pit, but its use had been abandoned except that it was used for hauling empty waggons, and for that purpose only occasionally. The ground where this road had been was hard, and the soil and gravel had become impacted by the travel upon it. On the 11th August, 1913, Leeson was employed by a man named Seabrooke to haul sand from the pit, and he drew one load of it on that day. It was taken from under where the old road had been, and, according to Leeson's testimony, he had smoothed down the face of the wall of the excavation at the place from which the sand was taken. About five o'clock in the afternoon, the three children of the respondent, aged respectively ten, six, and two years, accompanied by a sister aged eight years and a cousin who was nine years old, went into the pit to play, and, while they were playing at the place from which Leeson had taken the

sand, a piece of the impacted earth fell upon the children who were killed, and smothered them. The piece which fell was about fourteen inches in thickness at the outer edge and eight inches thick at the point at which it became detached, and about four feet long and about three feet wide.

There is an apparent conflict between the witnesses as to the condition of the pit at the place of the accident, but there is no doubt upon the evidence that there was a hole there, and that the distance from the overhanging piece which fell, to the bottom of the hole, was about five feet. There is no direct evidence as to what was the cause of the fall of the earth. It was suggested by the appellant's witnesses that it was caused by the children poking into the sand with a stick which one of them carried, and causing the sand, which was very dry and ran, to run and the upper crust to fall, owing to the support it had had from the sand beneath it being removed. There was, on the other hand, evidence from which the inference might be drawn that Leeson had removed the sand and left the upper crust overhanging and that the sand beneath had continued to run, and that in that way the upper crust had been caused to fall. The place of the accident was distant from the roadway, according to some of the witnesses, about twenty feet, and, according to others, about forty feet. That young children were in the habit of resorting to the pit to play, and playing there, is not open to question, and that this was known to Leeson is well proved, and was indeed admitted by him, but there is no evidence that this was known to the appellant or to any of its officials, unless, as the respondent contends, knowledge by Leeson was notice to the appellant.

The jury in answer to questions put to them found:—

(1) That the respondent's children and other children resorted to and played in the gravel-pit with the knowledge and permission of the appellant.

(2) That, previous to the accident, the appellant had not any knowledge, nor as reasonable men should they have known, that there was a likelihood of children being injured by the falling of earth, sand, or gravel while in the pit.

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(3) That there was an invitation to the respondent's children who were killed to use the pit.

(4) That the children entered the pit directly from the highway.

(5) That there was an excavation or hole under the upper crust of the earth at the place of the accident at the time of the accident.

(6) That the excavation or hole was there when the children went to the place of the accident.

(7) That the children's death was caused by negligence.

(8) That it was the negligence of the appellant that caused their death.

(9) That this negligence consisted in Leeson having dug the hole and left it unprotected.

(10) That the death of the children was not brought about or contributed to by any act or acts of their own.

(11) That there was no negligence on the part of the parents of the children or of others in whose charge they were which contributed to the accident.

And they assessed the damages at \$725.

There is no doubt that the excavation made by the appellant constituted a nuisance, but no case is made on the pleadings, and there is no finding of the jury, that the nuisance was the cause of the accident, and there is no evidence that would warrant such a finding.

The right of the respondent to recover must, therefore, depend on his having established that, in the circumstances, the appellant owed a duty to the children which it failed to perform, and that their death was occasioned by that failure.

The respondent's counsel relied on *Cooke v. Midland Great Western Railway of Ireland*, [1909] A.C. 229; but, assuming that the finding of the jury that the appellant invited the children to use the gravel-pit is warranted by the evidence—and I think it is not—the answer to the second question is fatal to the respondent's case. In the *Cooke* case the plaintiff would have failed but for the conclusion that was reached that the defendant knew that it was placing or leaving in the way of boys and

children, a temptation alluring to them and dangerous in its nature, and with which it was not improbable that they would come in contact. It was upon this knowledge that, in the opinion of Lord Atkinson, "the liability of the owner is at bottom based" (pp. 238-9).

The *Cooke* case has been considered by the Court of Appeal in *Latham v. R. Johnson & Nephew Limited*, [1913] 1 K.B. 398, and the Court there came to the conclusion that no new law was laid down or intended to be laid down in the earlier case, and pointed out that all that was decided in that case was that the defendants had put in a place open to their licensees a thing dangerous *in itself*, and that there was, therefore, cast upon the defendants a duty to take precautions for the protection of others who would certainly come into its proximity: *per* Farwell, L.J., at p. 408. Hamilton, L.J., at p. 416, says: "A child will be a trespasser still, if he goes on private ground without leave or right, however natural it may have been for him to do so. On the other hand, the allurements may arise after he has entered with leave or as of right. Then the presence in a frequented place of some object of attraction, tempting him to meddle where he ought to abstain, may well constitute a trap, and in the case of a child too young to be capable of contributory negligence it may impose full liability on the owner or occupier, *if he ought, as a reasonable man, to have anticipated the presence of the child and the attractiveness and peril of the object.*" Again, at p. 417, the same Lord Justice says that there was no evidence "that the defendants knew that there was anything dangerous about any stones in general or these stones recently shot there in particular," referring to the heap of stones which had or was supposed to have caused the injury to the child.

Besides the answer of the jury to the second question, there was, as I have said, no evidence of knowledge by the appellant that children were in the habit of resorting to the gravel-pit to play there. Leeson's knowledge of the fact was not notice to the appellant. He was not an officer or servant of the defendant, but, as has been said, a teamster employed to haul sand or gravel from the pit whenever occasion required that it should be hauled

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for the purposes of the appellant, and he had neither oversight nor care of the pit intrusted to him.

These difficulties in the way of the respondent's success are, in my opinion, insuperable; and there are, I think, other formidable difficulties in the way of it, to which it is not necessary to refer.

Even if knowledge by the appellant that children were accustomed to resort to the gravel-pit to play had been proved, we could not uphold the judgment without running counter to *Pedlar v. Toronto Power Co.*, 29 O.L.R. 527, affirmed by a Divisional Court (1914), 30 O.L.R. 581.

The appeal must be allowed and the judgment of the trial Judge reversed, and, in lieu of it, judgment be entered dismissing the action, the whole with costs, if costs are asked by the appellant.

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BANNISTER V. THOMPSON.

Husband and Wife—Enticement of Wife—Alienation of Affections—Separate Claims—Overlapping—Findings of Jury—Damages—Right of Action—Absence of Adultery—Wife Living with Husband.

The defendant was sued for (1) enticing away and (2) alienating the affections of the plaintiff's wife, and the jury assessed damages upon each claim separately:—

Held, that the action was maintainable notwithstanding that his wife was still living with the plaintiff and that the jury had not found that adultery had been committed.

But *held*, that the plaintiff had suffered no damage beyond the loss of his wife's affections, love, services, and society, and should be confined to the damages assessed by the jury upon the claim for alienation.

Winsmore v. Greenbank (1745), Willes 577, followed.

Judgment of MIDDLETON, J., 29 O.L.R. 562, varied.

APPEAL by the defendant from the judgment of MIDDLETON, J., 29 O.L.R. 562.

April 30. The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A.

C. W. Bell, for the appellant, argued that the plaintiff should have been nonsuited on both branches of the case, alienation of

affections and enticement. The jury gave \$1,000 on the first count and \$500 on the second, but did not find adultery, and the learned trial Judge found against adultery. The conditions of open rupture between husband and wife shewed that there was no affection between them. The plaintiff's wife was infatuated with the defendant, and all the advances were made by her. As to the alleged enticement, the only case on which the finding was based is *Winsmore v. Greenbank* (1745), Willes 577, which was considered in *Lellis v. Lambert* (1897), 24 A.R. 653, especially *per* Osler, J.A., at p. 664. [MEREDITH, C.J.O., remarked that these observations would be *obiter*.] Reference was made to *Bailey v. King* (1900), 27 A.R. 703, *per* Moss, J.A., at p. 712; *King v. Bailey* (1901), 31 S.C.R. 338. The learned trial Judge was in error in coming to the conclusion that there had been encouragement. He referred to *Metcalf v. Roberts* (1893), 23 O.R. 130, 138, 139, where the authorities are reviewed and the American cases considered: also to *Marson v. Coulter* (1910), 3 Sask. L.R. 485, 491, 492.

R. McKay, K.C., and *C. V. Langs*, for the plaintiff, the respondent, argued that there was ample evidence to justify the findings of the jury on the questions submitted to them. The observations of Osler, J.A., in the *Lellis* case were entirely *obiter*, and the *Bailey* case cannot be considered as an authority in favour of the defendant. Reference was made to *Smith v. Kaye* (1904), 20 Times L.R. 261; the *Metcalf* case, *supra*, and *Hutcherson v. Peck* (1809), 5 Johns. (N.Y.) 195, therein referred to, at p. 136; *Bennett v. Smith* (1856), 21 Barb. 439; *Barnes v. Allen* (1860), 30 Barb. 663; *Heermance v. James* (1866), 47 Barb. 120; *Bigaouette v. Paulet* (1883), 134 Mass. 123. [MEREDITH, C.J.O., referred to *Rinehart v. Bills* (1884), 82 Missouri 534.]

Bell, in reply, stated that the evidence shewed that the married life of the Bannisters had been very unhappy before the defendant came upon the scene.

September 21. The judgment of the Court was delivered by MACLAREN, J.A.:—This action was brought to recover damages for (1) enticing away and (2) alienating the affections of the plaintiff's wife by the defendant.

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These claims were set out in two paragraphs, and separate questions were submitted to the jury embodying them. They found in favour of the plaintiff on each, and assessed the damages at \$500 and \$1,000 respectively. The trial Judge entered judgment in favour of the plaintiff for \$1,500.

The defendant has appealed to this Court firstly on the ground that no action lies on such a charge where, as here, the wife is still living with her husband, or where the jury have not found that adultery has been committed.

The first reported case on which the trial Judge relied for the sufficiency of the ground of action is *Winsmore v. Greenbank*, Willes 577. It is cited as still being law in the leading text-books on the subject. See Addison on Torts, 8th ed., p. 858; Clerk & Lindsell on Torts, 3rd ed., p. 5; Pollock on Torts, 9th ed., p. 235; Eversley on Domestic Relations, 3rd ed., p. 175. It is also cited with approval by Armour, C.J.O., in *Bailey v. King*, 27 A.R. 703, at p. 713.

This ground of objection, in my opinion, is not well-founded.

The appellant also urges that the two paragraphs above referred to overlap. The first alleges that the defendant enticed away from the plaintiff his wife and procured her to absent herself unlawfully for long intervals from his house and society; the second, that the defendant by his wrongful acts alienated from the plaintiff the affections of his wife and deprived him of her love, services, and society.

For the wrongful acts of the defendant whereby he alienated from the plaintiff the affections of his wife and deprived him of her love, services, and society, the jury have awarded the plaintiff \$1,000. What damage has the plaintiff suffered beyond the loss of his wife's affections, love, services, and society? Nothing more is suggested in the evidence, and it is difficult to imagine any further loss or damage. The first paragraph refers rather to the means used, the second to the damages resulting therefrom. This is dealt with in the case of *Winsmore v. Greenbank*, *supra*, at p. 582, where, in answer to the objection that procuring, enticing, and persuading were not sufficient, if no ill consequences followed from them, it was held to be sufficient in

that case because it was specifically alleged that the plaintiff had thereby lost the comfort and society of his wife, and the advantage of her fortune, etc.

See also the case of *Metcalf v. Roberts*, 23 O.R. 130, where the cases on the subject are fully discussed.

I am consequently of opinion that the whole damages which the plaintiff can recover are included in the third question, based upon the second paragraph, and that the judgment should be reduced to \$1,000, and that there should be no costs of the appeal.

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[APPELLATE DIVISION.]

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Jan. 29.

Sept. 21.

Carriers—Carriage of Perishable Goods—Wrongful Delivery—Breach of Contract—Action by Vendor against Carriers — Damages — Deprivation of Control—Loss of Market—Rejection of Goods by Purchaser—Nominal Damages—Reference—Costs.

The plaintiffs on the 14th February shipped 300 cases of eggs from Owen Sound to Toronto by the defendants' railway, consigned to the order of a bank at Toronto, for the H. company. By the contract between the plaintiffs and the H. company, the eggs were to be "same as sample," "f.o.b. Owen Sound." A bill of lading was delivered to the plaintiffs by the defendants, and this with a draft on the H. company for the price was sent to the bank. The eggs arrived in Toronto, presumably on the 15th, which was a Saturday, and the car containing them was put on the H. company's siding, where it was found by the company on Monday the 17th February, and the eggs were on that day unloaded into the company's cold storage warehouse. No draft or bill of lading had then reached the company, and the contract contained nothing about the time of payment. On the 18th February, the draft was presented to the company by the bank with the bill of lading attached, and the draft was left with the company, but not the bill of lading. The company then examined the eggs, and, finding them not up to sample, condemned them, and so notified the defendants (the carriers), but did not notify the plaintiffs until the 20th. On the 21st, the plaintiffs inspected the eggs, and agreed that they were not up to sample, but refused to reload them or do anything with them, although the defendants offered them the eggs free from any claim; and the eggs remained with the company in cold storage until the 20th March, when they were sold by the defendants for unpaid charges. This action was brought for damages for wrongful delivery of the eggs; the defendants brought into Court the amount realised by the sale, less their charges:—

Held, that if a legal right is invaded or a contract broken, the person injured thereby may maintain an action, notwithstanding that no real damage is shewn; and the plaintiffs were entitled to maintain that the taking of the eggs into the H. company's warehouse on the 17th February was a wrongful delivery, contrary to the bill of lading, and were

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entitled to recover, not the value of the eggs, but the damages sustained by the wrongful act, *i.e.*, their real loss caused by the deprivation of control over the eggs from the 18th February, when the H. company inspected and rejected, until the 21st February, when the plaintiffs' control was re-established, if they chose to exercise it.

Sanquer v. London and South-Western R.W. Co. (1855), 16 C.B. 163, and *Hiort v. London and North-Western R.W. Co.* (1879), 4 Ex.D. 188, applied and followed.

Held, as to the damages, that the question was, whether the eggs could have been sold on the 18th February for a better price than on the 21st, and for more than they actually realised; and, as the plaintiffs at the trial did not adduce evidence upon this point—although they gave some evidence as to damage—they should have, at their own expense, if they so elected, a reference as to damages upon this basis; and, if they did not so elect, should have (in addition to the money paid into Court) judgment for nominal damages, with costs on the Division Court scale, without set-off.

Judgment of FALCONBRIDGE, C.J.K.B., reversed.

ACTION for damages for breach of a contract for the carriage of eggs.

The action was tried by FALCONBRIDGE, C.J.K.B., without a jury, at Owen Sound.

W. S. Middlebro, K.C., for the plaintiffs.

D. L. McCarthy, K.C., and *W. E. Foster*, for the defendants.

January 29. FALCONBRIDGE, C.J.K.B.:—On the 14th February, 1913, the plaintiffs, produce merchants at Owen Sound, shipped 300 cases of eggs from that town by the defendants' railway, consigned to the order of the Royal Bank, Toronto, for the Harris Abattoir Company. A bill of lading was delivered to the plaintiffs by the defendants' agent at Owen Sound, and this with a draft on the Harris Abattoir Company was sent to the bank. In the ordinary course the eggs should have arrived in Toronto on Saturday morning the 15th February; but, for reasons best known to themselves, the defendants placed the car containing the eggs on a siding belonging to the Harris company, who found it there on Monday the 17th. Thus the defendants delivered the eggs without obtaining surrender of the bill of lading, and of course without presentation of the accompanying draft on the Harris company. The draft was presented to the Harris company on Tuesday the 18th, and acceptance thereof was refused.

In the meantime the Harris company had unloaded the eggs and put them in the warehouse, and they claim that on inspection the eggs were not up to sample.

They reloaded the eggs on the car on or about the 3rd March, and they remained there for two or three days, and then were put back into cold storage. The defendants then assumed to take steps under the provisions of the Railway Act to sell them, and did sell them, realising the sum of \$615.59, which sum they paid into Court.

I am very favourably impressed with the evidence of Frank McKee, who had charge of the cold storage eggs for the plaintiffs, and also of Morley D. Lemon, one of the plaintiffs; and I find that, when the eggs were shipped by the plaintiffs, they were in accordance with the sample which had been furnished to the Harris company. The delivery by the defendants of the eggs to the Harris company, without the production and surrender of the original bill of lading, was a breach of their contract with the plaintiffs; and the defendants are responsible for, or at least cannot set up as a defence, the alleged condition of the eggs on delivery.

There will, therefore, be judgment for the plaintiffs for \$1,665, with interest from the 14th February, 1913, and costs.

The plaintiffs may take out the money paid into Court and credit the amount on their judgment.

I refer to *Tolmie v. Michigan Central R.R. Co.* (1909), 19 O.L.R. 26.

The defendants appealed from the judgment of FALCONBRIDGE, C.J.K.B.

April 28. The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A.

D. L. McCarthy, K.C., for the appellants, referred to *Tolmie v. Michigan Central R.R. Co.*, 19 O.L.R. 26, and contended that the defendants were liable only for the value of the eggs when they were refused by the Harris Abattoir Company, and that the evidence shewed that they were then worth no more than they were sold for.

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C. A. Moss, for the plaintiffs, the respondents, referred to sec. 345 of the Railway Act, and to the Am. & Eng. Encyc. of Law, 2nd ed., vol. 28, p. 716 *et seq.*; also to Mayne on Damages, 8th ed., p. 456; *Johnson v. Lancashire and Yorkshire R.W. Co.* (1878), 3 C.P.D. 499; *Mulliner v. Florence* (1878), 3 Q.B.D. 484, 490, 493, 494; *Sutherland on Damages*, 3rd ed., pp. 3256, 3286, 3326; *Ewbank v. Nutting* (1849), 7 C.B. 797, cited by Mayne (*op. cit.*) There was no evidence directed to the value of the eggs on the Monday.

McCarthy, in reply, stated that the eggs were "seconds," and selling at 12½ cents.

September 21. The judgment of the Court was delivered by HODGINS, J.A.:—Action for damages for wrongful delivery of 300 cases of eggs. The eggs in question arrived in Toronto, and the car containing them was put on the Harris Abattoir Company's siding, where it was found by them on Monday the 17th February, 1913. The latter company, having bought eggs from the respondents and finding these on the track, assumed to be entitled to receive them, and unloaded them that morning into their warehouse. No draft or bill of lading had then appeared, and nothing had been said in the bargain about the time of payment. The draft was presented on Tuesday morning the 18th February by the Royal Bank, with the bill of lading attached. The draft was left with the Harris Abattoir Company, but without the bill of lading. On this the eggs were examined, and, not coming up to the sample, were condemned. Notice of this was given to the appellants, but not to the respondents—the Harris Abattoir Company thinking that the respondents were trying to make them take bad eggs, and desiring to protect the appellants, who had delivered them. The appellants on Thursday the 20th February applied to the respondents, through their Stratford agents, for permission to inspect, which was granted, and on the same day notice was sent by the Harris Abattoir Company that the eggs were bad.

On Friday the 21st February, McKee, representing the respondents, came down and inspected the eggs, in company with the officers of the Harris Abattoir Company. In the result, he

agrees that the eggs were not up to sample. He, however, refused to reload them or do anything with them, and they remained with the Harris Abattoir Company until the 27th February, when they were reloaded into a car, but, at the request of the appellants, were re-transferred on the 6th March into the Harris Abattoir establishment, where they remained till the appellants sold them for the unpaid charges. The sale was on the 20th March, and realised \$653.99, leaving \$615.59 after deducting freight charges. The details are given in the evidence. The appellants say that the respondents would do nothing, preferring to rest on their supposed rights arising out of the premature delivery.

Under the circumstances, the appellants contend that, if they are liable at all, there are no damages, because, if they had retained possession and allowed the Harris Abattoir Company to inspect, the eggs would have been rejected, and properly so. Hence, they say, no damage has resulted to the respondents except what is the natural consequence of shipping eggs which were not up to sample, and then refusing to make the best of the position.

The bargain is not all in writing, but before shipment the Harris Abattoir Company had bought the eggs, and had the right to see if they were up to sample. If the regular course of retaining possession, until delivery was demanded by the holder of the bill of lading, had been followed, the difficulty would not have arisen. The act of unloading on Monday into the Harris Abattoir Company's establishment was, upon the evidence, no detriment to the eggs. The inspection was made on Tuesday, and the eggs proved not to be according to contract. Had this inspection been made by consent or arrangement with the holder of the bill of lading, the Royal Bank, communication of the rejection should have reached the respondents earlier. At is was, the Harris Abattoir Company refrained from giving the latter notice otherwise than by telling the bank messenger that they would not pay the draft and that the eggs were bad, and communicated direct only with the appellants. Apparently in order to conceal their previous delivery and give the respondents the impression that they still held the eggs, the appellants asked for

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permission for the purchasers to inspect, who, in their turn, on that day, without further inspection, notified the respondents that the eggs were refused.

On McKee's arrival he must have learned the facts, and, while agreeing that the eggs were not up to sample, declined to deal with them in any way. I do not agree with the argument that, if no real damage was shewn to have resulted from the misdelivery, there could be no recovery. The general principle is, that if a legal right is invaded or a contract broken the person injured thereby may maintain an action.

In a case very similar in its circumstances to this, *Sanquer v. London and South-Western R.W. Co.* (1855), 16 C.B. 163, it was conceded in argument that nominal damages could be recovered even if no loss was suffered.

In *Hiort v. London and North-Western R.W. Co.* (1879), 4 Ex. D. 188, the Court of Appeal held that where the bailees, in anticipation of an order, which was in fact received a few days later, delivered goods without the authority of the bailors, they were guilty of a wrongful act, in respect of which a right of action vested at once in the bailors, and that the deprivation for some days of the control of their goods was sufficient damage in the eye of the law to enable them to sue and to recover nominal damages. No right, however, accrues to recover more than the original and actual loss; and, in order to determine whether further or other damages are recoverable, it is necessary to examine somewhat critically the exact position of the parties.

The contract was partly verbal, partly in writing, but there is no dispute as to its terms. The eggs were to be "same as sample," and the offer and acceptance both say "f.o.b. Owen Sound." The samples candled at 4 to 6 eggs bad to the case [each case containing 30 dozen] according to Cowan, and 6 to 8 eggs according to Fox—i.e., about half a dozen to the case. The shipment, tested by 11 cases, ran 10 dozen bad to the case, or 110 dozen in 330 dozen. This is confirmed by McKee, for the respondents, who also says that he candled eggs out of this same room a week previous to the sale and found 2 dozen bad to the case, and that, after he returned from Toronto, he tried 3 more cases and found a little less than 3 dozen bad to the case.

The respondents say that a fair average for storage run in February would be 3 or 4 dozen bad to the case. Upon McKee's evidence and that of the respondent Morley D. Lemon, the learned trial Judge finds that when the eggs were shipped to the Harris Abattoir Company they were in accordance with the sample which had been furnished to that company. This finding would be embarrassing if the case were between vendor and purchaser, for McKee admits that he cannot account for the difference between the eggs as he saw them on the 21st February and those he tested on the 14th February, a week before the shipment, and that the shipment to Toronto and the removal into the Harris Abattoir establishment would not account for all that difference.

On a shipment f.o.b. Owen Sound, the purchaser would ordinarily have to accept the usual deterioration during transit, yet where there is a sale by sample, and the goods are to be delivered and inspected elsewhere than at the point of shipment, the bulk must correspond at the delivery-point with the sample, upon inspection. Both parties apparently agree in this view. But in this case the question is not whether the eggs were really up to sample or not, but what was the situation of the parties, including that of the appellants, when the eggs were inspected and rejected, rightly or wrongly. In any event the learned trial Judge does not specifically find that the eggs when received in Toronto were equal to the sample, nor yet that the deterioration was wholly attributable to the transit.

The respondent Morley D. Lemon, in cross-examination having said that he did not know if the eggs were up to sample or not, as he did not see the eggs, was asked, "If they were not up to sample, did you dispute the right of the Harris Abattoir Company to reject them?" and answered, "If they had been rejected on Monday, when they received them, I would have been perfectly satisfied," i.e., assuming that they were not up to sample.

In answer to a question, "If the draft was presented on the 18th, and on presentation of the draft they immediately inspected and rejected the eggs, you could take no exception to that?" this respondent says, "No, that would be a reasonable

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time.” And further on: “They could not inspect them until they got the draft and bill of lading.”

If it were necessary to determine whether the eggs were up to sample or not, the evidence as a whole satisfies me that on the 18th February the bulk did not correspond with the cases sent down previously. McKee’s evidence that meat in the same room would taint the eggs is based on their being left there a week, while in fact they were there only from the 17th to the 21st February. And he is the reverse of positive on the point. Others deny this inference, and it is not said by McKee that the supposed taint caused the defect in quality; indeed, he says that he is unable to account for the deterioration, which is very marked, even as compared with his earlier and later tests, and is quite irreconcilable with the condition of the samples.

The eggs were, when unloaded, put into the egg department, which is said to be the same as cold storage at that time of year, and then put in regular cold storage when discovered to be bad, and there they remained until and after the 21st February.

But I do not think it is essential to determine this question as between the parties to this action. The appellants had a bill of lading in their possession, the explicit provisions of which they departed from. But in point of fact their breach of duty only enabled the Harris Abattoir Company to examine more easily, and that company never claimed to have any right to the eggs after the 18th February. The error of the respondents in attaching the invoice to the bill of lading sent to the Royal Bank contributed to lead the Harris Abattoir Company to think that the eggs were being delivered to them pursuant to their contract, subject to their right to inspect. Immediately on learning the real situation, they examined the eggs, and the respondents admit their right to do so when they did it. The respondents put their claim upon the neglect of the appellants or the Harris Abattoir Company to notify them until the 20th February, as the market was falling, and they ignore the notice on the 18th February to the bank, their agents, to whose order the goods were consigned. In so doing, they are obliged to insist that the taking on the 17th February of the eggs into the Harris

Abattoir establishment was a wrongful delivery, contrary to the bill of lading. This is an extreme position, in view of the fact; but, as I have indicated, it was one that they were entitled to assume, and carries with it the right to damages.

But in determining these damages the real circumstances must be taken into account. On the 18th February, the Harris Abattoir Company rejected the eggs, and made no claim further to retain them. On the 20th February, the respondents knew of the rejection; and on the 21st February, their representative, McKee, was aware of where the eggs were and that they were at his disposal. The respondents, if the rejection was wrongful, could have insisted upon their bargain being carried out, and could have looked to the Harris Abattoir Company, thus relieving the appellants from any liability. If it was rightful, they had the eggs then under their control, and might have endeavoured to dispose of them without any let or hindrance from the Harris Abattoir Company, in whose warehouse they were, and whose possession of them minimised the danger of further deterioration.

Indeed, on that assumption the respondents were bound to take them away: *Heilbutt v. Hickson* (1872), L.R. 7 C.P. 438, at p. 452. In either view the appellants made such reparation as they could by the offer to McKee—for such the interview on the 21st February amounted to—of the eggs free from any claim.

In the case of *Hiort v. London and North Western R.W. Co.*, already referred to, Bramwell, L.J., thus states the law (4 Ex. D. at p. 195): “A return of the goods undoubtedly might be shewn to reduce the damages in the case of a conversion, not only where the owner voluntarily received back the goods, but where he took them back against his will. . . . It is clear, therefore, that on the return of the goods the plaintiff would recover, not their value, but the damages he had sustained by the wrongful act, which was called the conversion.” And he puts what occurred in that case, namely, the subsequent giving of an order to the person by whose direction they had been wrongfully delivered, as something that, while not a return, was in the nature of a return, and considers that the same reason applies for reducing

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the damages to nominal damages. Thesiger, L.J., at p. 200, says that the plaintiffs were entitled to recover damages only for the deprivation of their control over the goods from the time of the unauthorised delivery until the time when they did authorise the delivery.

Applying this to the present case, I think it is clear that the respondents, if entitled to damages, are only entitled to their real loss caused by the deprivation of their control over the eggs from the time when admittedly the Harris Abattoir Company might inspect and reject, i.e., the 18th February, until the time when their control was re-established, if they chose to exercise it, namely, the 21st February. The respondents, in bringing this action, elect not to look to the Harris Abattoir Company on their contract, thus admitting that the rejection was proper; and they are only entitled to damages against the appellants on the basis I have indicated, treating as in the nature of a return the offer to McKee on the 21st February to give up the eggs. This is enforced by the consideration that unreasonable conduct on the part of the person whose property has been converted may always be taken into consideration in assessing the damages. See *Wilson v. Hicks* (1857), 26 L.J. Ex. 242.

Some evidence was given as to damage at the trial, but, I think, the real point to be decided is, whether the eggs could have been sold on the 18th February for a better price than on the 21st February, when the respondents could have disposed of them if they had chosen so to do. The eggs were actually sold afterwards at a considerable loss, but that was after they had been exhaustively and critically examined, and their condition known.

The prices of regular storage eggs in Chicago are given by the respondent as follows: Monday 17th February, 14 cents; Tuesday 18th February, 13½ cents; Wednesday 19th February, 13 cents; Thursday 20th February, 13 cents. Mr. Cowan, of the Harris Abattoir Company, says that 13 cents there is equal to 16¾ cents here, adding 3 cents duty and three-quarter cents for freight, and that the price held up in Toronto owing to cold retarding the arrival of fresh eggs. There is nothing to indicate

that these eggs, which are shewn to have deteriorated, could have been sold at the prices quoted. They did sell afterwards in March at $12\frac{1}{2}$ cents and 12 cents for the good ones; and, while it might not be unfair to conclude that the Chicago prices given could have been realised on the 21st February, yet there is no real basis of fact upon which a judgment could be given for damages founded upon those figures. Even assuming that $17\frac{1}{4}$ cents could have been got on the 18th February, if prompt notice of rejection had been given, yet, on the same hypothesis, $16\frac{3}{4}$ cents could have been realised on the 21st February, if the prices that day were the same as on the 20th February. So that the damages would only amount to \$67.50.

I think that the respondents should be entitled to shew, if they can, that they could have resold these eggs on the 18th, 19th, or 20th February, to better advantage than upon the 21st February, and in excess of the prices afterwards realised. But they ought to bear the cost of a reference on that point, if they choose to take one, in view of the fact that they went into evidence of damage at the trial, and should have done so upon the proper basis.

The appeal should be allowed with costs, and judgment should be entered for the respondents for nominal damages, say \$1, and for payment to the respondents of the amount in Court, with a reference, at the respondents' expense, if they seek further damages upon the principle I have indicated. If a reference is had, the judgment will reserve further directions and costs of action. The reference may be to the Master at Owen Sound or to the Master in Ordinary, as the respondents may elect. If the reference is not had, the judgment will be with costs on the Division Court scale without set-off.

Appeal allowed.

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Sept. 21.

Landlord and Tenant—Buildings of Tenant—Payment for, by Landlord—Covenants in Leases—Submission to three Persons to Determine “Amount Proper to be Paid”—Arbitration or Valuation—Conduct of Valuator—Bias—Disqualification—Evidence—Admission of ex Parte Statements—Special Circumstances—Agreement of Parties—Method of Valuation—Entire Building—Disjointed Parts—Estoppel—Misapprehension or Mistake of Valuers—Effect of, in Action upon Covenants.

In an action by lessee against lessor to recover the amount found by a board of valuers, appointed under provisions of the leases, to be the value of the buildings erected by the lessee upon the demised premises:—*Held*, following *Re Irwin and Campbell* (1913), 4 O.W.N. 1562, 5 O.W.N. 229, that the proceedings were by way of valuation, not arbitration.

2. That the finding of the trial Judge that one of the valuers was not (as the defendant contended he was) disqualified by reason of bias, should, on the evidence, be affirmed.
3. That, upon the evidence, the arrangement between the parties was that the valuers, who had no special skill or knowledge, and had no authority to take evidence under oath, were to seek information as best they could for the purpose of their valuation; and their finding was not invalidated by reason of their accepting *ex parte* statements and making individual inquiries. The statement in *Hudson on Building Contracts*, 3rd ed., p. 73, that there is no restriction upon what a valuator may do for the purpose of making his valuation, must be taken with some limitation; the rule in cases of arbitration which excludes such statements may be applicable in the ordinary case of valuation; but this case must be decided upon its peculiar and unusual circumstances.
4. That the party seeking to take property cannot rely on a depreciation caused by his own act or on the assumption that he can take an attitude which will injure the value to the owner; and in this case the defendant could not, in dealing with the 14 feet upon which half of one of the buildings stood, exclude from consideration the fact that she was acquiring the other half, and require the valuers to arrive at a value upon the assumption that she was receiving only part of it. The words of the leases, “the amount proper to be paid,” were large enough to cover a valuation of the building as an entire one, and not as disjointed portions of a building.

In re Lucas and Chesterfield Gas and Water Board, [1909] 1 K.B. 16, and *Re Gibson and City of Toronto* (1913), 28 O.L.R. 20, applied and followed.

5. *Quære*, whether a misapprehension of the facts or a mistake in law by the valuers could be reviewed in an action upon the covenants in the leases.

Judgment of LENNOX, J., affirmed.

ACTION by Frank Alexander Campbell against Eliza Jane Irwin, administratrix and trustee of the estate of John Day Irwin, deceased, to recover \$35,300, the sum at which certain buildings erected upon leasehold premises were valued by a board of valutors, composed of Nicholas Garland, appointed by

the defendant, John A. Barron, County Court Judge, appointed by the plaintiff, and Edward Morgan, County Court Judge, chosen by the other two as third valuator; and for an account of rents received by the defendant and other relief. The valuation took place under leases of the premises made by John D. Irwin, deceased, as lessor, to the plaintiff's assignor as lessee.

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The action was tried by LENNOX, J., without a jury, at Toronto.

N. W. Rowell, K.C., and *George Kerr*, for the plaintiff.

W. N. Ferguson, K.C., and *W. N. Tilley*, for the defendant.

February 23. LENNOX, J.:—Whether the proceeding under the leases was an arbitration or a valuation, and whether the valutors were bound to act judicially or not, the document sought to be enforced in this action, or the plaintiff's right to recover, is not in any way affected by anything done by Mr. Garland or the plaintiff in connection with North Toronto lots.

Yet the suspicion engendered by Mr. Garland's endorsement of the plaintiff's promissory note (for the accommodation of Mr. Dinnick) has been a potent factor in this litigation, and, but for this, I have no doubt at all, Nicholas Garland would still be firmly entrenched in the confidence of the defendant's solicitor and agent, Mr. Charles Millar.

Suspicion of course is not enough: *Crossley v. Clay* (1848), 5 C.B. 581; and "wherever the conduct of arbitrators is sought to be impeached the Court will look with a jealous and scrutinising eye through the evidence advanced for that purpose:" *Brown v. Brown* (1683), 1 Vern. 157, 23 Eng. Rep. 384, editorial footnote at p. 385. This domestic tribunal is the direct outcome of the specific terms of the defendant's own leases; and "we must not," says Chief Justice Cockburn, in *In re Hopper* (1867), L.R. 2 Q.B. 367, at p. 375, "be over ready to set aside awards where the parties have agreed to abide by the decision of a tribunal of their own selection, unless we see that there has been something radically wrong and vicious in the proceeding." For the present I am not distinguishing between an arbitration and a valua-

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tion, although of course arbitrators are bound to observe rules and principles of judicial procedure never exacted or in fact looked for in the case of valuers.

Speaking then of arbitrators, corruption, fraud, partiality, or wrongdoing, if alleged, must be distinctly established: *Goodman v. Sayers* (1820), 2 J. & W. 249, 22 R.R. 112. And it must be shewn that the parties were actuated by corrupt motives, and that the arbitrator was influenced by what is complained of: *Moseley v. Simpson* (1873), L.R. 16 Eq. 226; *In re Hopper*, L.R. 2 Q.B. 367; *Doberer v. Megaw* (1903), 34 S.C.R. 125. And the Court favours awards: *Morgan v. Mather* (1792), 2 Ves. Jr. 15.

The defendant says: "The arbitrator Nicholas Garland . . . was an interested person . . . and, unknown to the defendant, he was illegally biased for and interested in the plaintiff, whereby he was disqualified from acting in the capacity he filled."

The attempt was to shew that Garland was a mortgagee of land belonging to the British Land Company Limited, and that, if the company sold some of their lots to the plaintiff, they would be in a better position to meet their obligations to this valuator, Well this, if all true, goes no further than the alleged disqualification of the arbitrator in *Drew v. Drew and Leburn* (1855), 2 Macq. H.L. Sc. 1. There the claim that Mr. Leburn was interested in building up the fortunes of Mr. Drew, and so disqualified, does not appear to have been seriously entertained by the Lord Chancellor. At p. 7, his Lordship says: "Mr. Peter Drew has certain trust moneys in his hands, of which Mr. Leburn, the arbitrator, is one of the trustees, and Mr. Peter Drew, if this award goes against him, will be less solvent or more insolvent than if it goes in his favour. If it goes in his favour, it will be more likely that he will be able to pay Mr. Leburn, the arbitrator, his debt, than if it goes against him. My Lords, I do not hesitate to say, that that is a sort of interest, if you call it interest, with which it is quite impossible for your Lordships to deal." As was said in *Halliday v. Duke of Hamilton's Trustees* (1903), 5 F. (Ct. of Sess. Cas., 5th series) 800, there is nothing in such a case to suggest that the arbitrator has not still "an open mind."

But, if all that is suggested were true, another difficulty confronts the defendant. The valuation and all questions referred to Mr. Garland and his associates had been determined upon, the result had become known, and the preparation and signing of the valuation paper had been arranged for, before the land transaction was initiated or even spoken of. In *In re Underwood and Bedford and Cambridge R.W. Co.* (1861), 11 C.B.N.S. 442, the arbitrator consulted with Underwood's solicitor as to the form of the award, and he was allowed to draw it up, but Chief Justice Erle, being satisfied that "the arbitrator had made up his mind as to the substance of the award," before he consulted the solicitor, refused to set it aside.

In *In re Hopper* the distinction between judicial and merely formal acts came up in two ways, namely, as to acceptance of hospitality before the award was executed, and the validity of the umpire's appointment. The first point turned, perhaps, chiefly upon the absence of evidence of a corrupt intention, as already referred to; but the other distinctly involved the question I am now dealing with; and it was decided that, the choice of an umpire having been made at a formal meeting of the two arbitrators, their judicial functions in this regard were then completed, and the endorsement of the appointment upon the submission and the signing of it was merely a formal record of their joint judicial act; and it was valid, although each signed in the absence of the other. I can see no difference in principle between this and the signing of a valuation previously determined upon and made known, and signed without variation.

In *Goodman v. Sayers*, 2 J. & W. 249, above referred to, one of the arbitrators, Hobbs, was not present when the award was signed, or notified of the meeting. Sir Thomas Plumer, in delivering the judgment of the Court, said (pp. 261, 262): "Here, however, all the evidence was heard, and all the substance of the business was settled in his presence; the rest, the signing of the award, was a mere form; this they thought they were at liberty to do by themselves; they did not however act secretly, but determined, in the manner in which they had previously informed them that they should. Then, should the Court set aside the

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award on account of the absence of one arbitrator under these circumstances? The cases have never gone to that length.”

But it is not true—as I find—that these parties were actuated by improper motives, or were acting in collusion or bad faith. The fact is that Nicholas Garland has no financial interest in the subdivision in question as mortgagee or otherwise, and it made no difference to him, nor to any member of his family, so far as I can see, whether the plaintiff did or did not purchase lots from the company. The mention of the lots at all was occasioned by a purely casual remark of the plaintiff, as he describes.

So far, I have dealt with this action without reference to whether the plaintiff’s rights are dependent upon an arbitration or valuation, but I am not at liberty to consider the question an open one. Upon an appeal from an order of Mr. Justice Middleton dismissing the defendant’s motion to set aside the valuation or award now in question, the Court of Appeal declared that the leases set out in the statement of claim provide for “a valuation and not an arbitration.” *

It is not, and could not—in so many words—be contended that I am not bound by this judgment, and yet, if I correctly apprehend Mr. Tilley’s very able argument, many of his propositions are in direct conflict with the interpretation referred to. It is argued for the defendant that:—

(1) The leases provide for an arbitration, though not for an arbitration within the provisions of the Arbitration Act.

I am at a loss to see how I can give effect to this contention and to the judgment referred to; and counsel for the defendant has not pointed the way. The judgment of the Court is not that the leases do not provide for an arbitration under the statute, but that they provide “for a valuation and not *for an arbitration*” at all; and I am not only bound by this declaration, but, if I may say so with the very greatest respect, it is the conclusion I would have reached in any case.

(2) Even if a calculation was the proceeding provided for by the leases, the proceedings taken were in fact arbitration proceedings, nevertheless; and of consequence, I presume, to be governed by the rules and principles of procedure in such cases.

*See *Re Irwin and Campbell* (1913), 4 O.W.N. 1562, 5 O.W.N. 229.

I have not been directed to evidence supporting this proposition, and I have not found any. On the contrary, both Mr. Millar and Mr. Hunter repudiated the idea of an arbitration or the taking of evidence and insisted upon a valuation, and Mr. Millar specifically objected to evidence upon oath, and directed the valuers to inspect the property and get information where and how they could. With this as to what actually occurred and with the leases, the notices, and the formal agreement, executed concurrently with the valuation itself—all providing for a valuation—it is impossible to find that the proceedings were in fact arbitration proceedings, or that anybody connected with the matter had any idea that they were.

(3) The leases provided for proceedings of a judicial character, or the valuers, although valuers only, were bound to exercise their functions judicially. That “a valuation and not an arbitration” is provided for is a settled point. A starting-point for this argument would be gained were it shewn that a valuation “of a judicial character” is distinguishable from an arbitration. I know of no case in which such a contention was established.

In providing for a future valuation, the parties to the contract can, of course, have guaranteed to them substantially all the formalities and safeguards of a trial in Court; but, if they are relying upon quasi-judicial procedure, they must say so, or clearly indicate it, in their contract.

No one will dispute that contracting parties may agree that questions which may arise in the future, including questions of value or compensation, shall be investigated or determined in any lawful way they see fit to provide for, and this in no way shifts the clearly defined boundary-line between valuation and arbitration; but, if they provide for all the incidents of an arbitration, it becomes an arbitration.

Nowhere, perhaps, is this distinction more pointedly expressed than by Chief Justice Cockburn in *In re Hopper*, L.R. 2 Q.B. at p. 372, where he says: “I am not at all disposed to quarrel with the cases of *Collins v. Collins* (1858), 26 Beav. 306, and *Bos v. Helsham* (1866), L.R. 2 Ex. 72, looking at the facts upon

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which they were decided; but I think they must not be taken to comprehend every case of compensation or value; as where, in ascertaining the value of the property or amount of compensation to be paid, the matter assumes the character of a judicial inquiry, to be conducted upon the ordinary principles upon which judicial inquiries are conducted, by hearing the parties and the evidence of their witnesses. If it be the intention of the parties that their respective cases shall be heard, and a decision arrived at upon the evidence which they have adduced before the arbitrator, it would be taking too narrow a view of the subject to say that, because the object to be arrived at was the ascertaining of the value of property or the amount of compensation to be paid, the matter was not properly to be considered as one of arbitration." This statement is quoted with approval by Lord Coleridge in *Turner v. Goulden* (1873), L.R. 9 C.P. 57, at pp. 59, 60.

An arbitration is a judicial or quasi-judicial proceeding, a trial out of Court, a substitute for the ordinary method of trial. In *Wadsworth v. Smith* (1871), L.R. 6 Q.B. 332, Cockburn, C.J., at p. 336, says: "I am of opinion that in sec. 17" (similar to subsec. (d) of sec. 2 of our Arbitration Act) "by 'an agreement or submission to arbitration by consent' is meant an agreement by which it is intended by the parties that the matter shall be submitted to a judicial inquiry before a person chosen between them, instead of being left to the ordinary proceedings of a court of law, and not merely left to the uncontrolled and off-hand decision of some architect or surveyor to be appointed by one of the parties only."

In these trials by laymen judicial rules of procedure may be relaxed, but must not be ignored. There must be substantial compliance with the fundamental principles of investigation adopted by the Courts. Prominent among these are the rules governing the production of evidence: *In re Enoch and Zaretsky Bock & Co.'s Arbitration*, [1910] 1 K.B. 327 (C.A.); *Walker v. Frobisher* (1801), 6 Ves. 70; *In re Brien and Brien Arbitration*, [1910] 2 I.R. 84 (K.B.D.); *In re Plews and Middleton* (1845), 6 Q.B. 845; and *Dobson v. Groves* (1844), 6 Q.B. 637; and this is exactly the kind of procedure demanded by the terms of the

leases, says Mr. Tilley. Is not this simply another way of arguing back again that the appointees were to be arbitrators, and the proceeding an arbitration, the Court of Appeal to the contrary, notwithstanding?

On the other hand, no such rule applies to provisions for valuation, in case a question of valuation should arise. I have examined all the cases and authorities referred to by counsel on both sides, and scores of others, and the cases all go to shew that it is invariably arbitration, on the one hand, with its judicial functions, or valuation in its primary, ordinary meaning on the other—the arbitration for the most part, but not quite invariably, being based upon an actual dispute or difference existing at the time of the agreement or submission: *Re Laidlaw and Campbellford Lake Ontario and Western R.W. Co.* (1914), 5 O.W.N. 534; * *Bottomley v. Ambler* (1877), 38 L.T.N.S. 545; *Re Hammond and Waterton Arbitration* (1890), 62 L.T.N.S. 808; Hudson on Building Contracts, 3rd ed., p. 713; *Collins v. Collins*, 26 Beav. 306; *In re Dawdy* (1885), 15 Q.B.D. 426; *Leeds v. Burrows* (1810), 12 East 1; Fletcher on Arbitration, 3rd ed., p. 4; Slater on Arbitration and Awards, 5th ed., p. 4, and “Valuation,” at p. 205; *Hickman & Co. v. Roberts*, [1913] A.C. 229; *Bristol Corporation v. John Aird & Co.*, [1913] A.C. 241; *Chambers v. Goldthorpe*, [1901] 1 Q.B. 624; and *In re Carus-Wilson and Greene* (1886), 18 Q.B.D. 7; and this last case, contrary to a suggestion thrown out by Lord Esher in the *Dawdy* case, and by Mr. Justice Brett in *Turner v. Goulden*, L.R. 9 C.P. 57, shews that the character of the proceeding is finally determined by the terms of submission, and a proceeding which opens as a valuation is not converted into an arbitration by the introduction or action of a third valuer or even an umpire.

But, even if Mr. Tilley is right that there is an intermediate domestic tribunal “of a judicial character” somewhere in between an arbitration and a valuation, the defendant is not in a position to complain of what was done.

It was Mr. Hunter and Mr. Millar who prevented a quasi-judicial inquiry and insisted upon a valuation merely, and upon

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just the character of investigation that obtained. "There is a good old-fashioned rule," says Bowen, L.J., in *Ex p. Pratt* (1884), 12 Q.B.D. 334, at p. 341, "that no one has a right so to conduct himself before a tribunal as if he accepted its jurisdiction, and then afterwards, when he finds that it has decided against him, to turn round and say, 'You have no jurisdiction.' " And in *Drew v. Drew and Leburn*, already cited, the Lord Chancellor, referring to the substitution of a "solemn declaration" for an oath, says (2 Macq. H.L. at p. 11) : "We are told that that is not an uncommon way of taking evidence in Scotland; but at any rate the thing having been done in the parties' own presence, to say that he shall object to it, after having allowed the proceedings to go on for months subsequently, no less than ten meetings having taken place, is perfectly preposterous, and out of all reason." To the same effect is the judgment of Mr. Justice Riddell in *Re Zuber and Hollinger* (1911), 25 O.L.R. 252.

(4) The east and west ends of the building on King street should have been valued separately.

I am disposed to think that the plaintiff had a right to insist upon a valuation as upon one entire building. An examination of the leases, and the facts that it was put up without reference to lot divisions, that it would not have been a rational act to build in any other way, and that, if destroyed or injured, it was to be restored and maintained just as it was found at the time of valuation, satisfy me that, as between the parties to this action, there was no ground whatever for deducting for imaginary walls and stairways, as is now contended for. But this is not material. The witnesses who testified upon this question are all men of unassailable integrity, men in whom I would place implicit credit. But, unfortunately, there is a clear conflict of testimony upon this one point, and I only conclude that there is an unintentional mistake somewhere. There is a strong preponderance of testimony to the effect that it was distinctly understood and agreed by all parties that this building should be valued as one building—"as a whole," as it is expressed. The defendant must abide by this. The authorities quoted as to estoppel apply here again.

(5) The valuation is avoided by the valuator's interview with

the plaintiff in the absence of the other parties? In the case of an arbitration I think this would be ground for setting aside or refusing to enforce the award. Cases above referred to and others go to shew this. In such a case the arbitrator is not, in contemplation of the Courts, in any sense the representative of the person who appointed him. The agent? Such a thing could not be thought of. It is a domestic court of justice. In a valuation case it is different. Even then a triangular tribunal of judicial impartiality is a thing to be desired, but it is rarely desired by the parties. When Nicholas Garland was appointed, it was expected of him that he would be earnest, vigilant, and loyal in looking after the defendant's interest, and he was; a sensitive anxiety to protect the other side—unassailable judicial poise—was not expected—or desired. When Mr. Garland halted Campbell he was *endeavouring to value the property down*. Already Mr. Millar had sent Richard Smith to him, and he knew, what the other two valuers did not know, that Smith put the buildings at \$40,000 and Armond at \$42,000. He remembered that Campbell was somewhat disenchanted by the evidence in the O'Brien valuation. He knew that Mr. Millar had been most emphatic in insisting that it was the duty of the valuers to search for information everywhere—and there was no telling what these inquiries might elicit—and he knew that to call Smith or Armond would be but to corroborate the statements already in; and in this situation, as a keen, shrewd business man, he acted promptly and boldly, and by doing so, I have no doubt, brought about a valuation some thousands lower than it otherwise would have been. I don't think any objection is open to the defendant upon this head. The defendant is not in a very good position to complain. The party complaining ought to be free from blame: Lord Eldon in *Fetherstone v. Cooper* (1803), 9 Ves. 67. I am satisfied that it was quite clear to Mr. Millar that he could bring forward any evidence, estimates, or opinions upon value he thought fit to use.

(6) The valuation is avoided by including in it \$300 for Judge Barron's costs.

I was surprised that this point was pressed. There is no

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ground for saying that this was done. I am quite satisfied that it was not done. The \$300 had reference to the lavatory, as was stated in Court.

(7) The valuation is not in the terms of the leases and is ineffectual for leaving undecided "the amount proper to be paid" for the buildings.

The award is clearly sufficient, and I would not think it necessary to refer to this point, were it not that, in addition to being pleaded, it was strenuously urged as a defence. The valuation makes it quite clear that "the amount proper to be paid" is the sum of \$35,300, and directs payment of this sum. This is not the only expression used in the leases. They are to make a valuation of the buildings, and, before entering on their duties, they are to be "sworn to make a proper valuation."

(8) This was not the joint act of the valuers. There is nothing to support this argument. The contrary is to be presumed from the document itself. It is manifestly not necessary that they should at the beginning be of one mind. Two of them were inclined to put the valuation higher, but finally came to look at it as Garland did. This is not a ground of objection. *Chichester v. McIntire* (1830), 4 Bli. N.R. 78, has no application. McIntire's arbitrator from first to last was of opinion that the rent should be £43; and he signed the award only because he was urged to do so by a person whom he had no right to consult.

I have considered the evidence as to the value of the buildings only in so far as it throws light upon the conduct of the valuers: *Morgan v. Mather*, 2 Ves. Jr. 15; *Goodman v. Sayers*, 2 J. & W. 249.

There will be judgment for the plaintiff against the defendant in the character in which she is sued, for \$35,300, with interest from the 1st July, 1913, and costs of action. There will be a reference to adjust the rents, if the parties cannot agree.

The defendant appealed from the judgment of LENNOX, J.

April 20 and 21. The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A.

W. N. Tilley, for the appellant, argued that no valuation was made within the terms of the lease, and that the conduct of the valuers was open to objection with special reference to the valuator Garland. Credit was given to statements by persons who were not sworn. Furthermore, there are two leases, and the building is partly covered by one lease and partly by the other. The valuers have erred in treating the building as one whole, and not as split in two. Reference was made to *Race v. Anderson* (1886), 14 A.R. 213; *Chambers v. Goldthorpe*, [1901] 1 Q.B. 624; *Hickman & Co. v. Roberts*, [1913] A.C. 229; *Bristol Corporation v. John Aird & Co.*, [1913] A.C. 241, 251.

N. W. Rowell, K.C., and *George Kerr*, for the plaintiff, the respondent, argued that the Court should look at the circumstances attending the valuation. The plaintiff's solicitor wanted an arbitration, but the defendant's view that there should be a valuation prevailed upon the arbitrators, and it has been decided by this Court that the proceedings under the leases are by way of valuation, and not of arbitration: see *Re Irwin and Campbell*, 5 O.W.N. 229. The defendant acted on the award, went into possession, made leases and collected rents. They referred to *Eads v. Williams* (1854), 4 DeG. M. & G. 674; *Hudson on Building Contracts*, 3rd ed., p. 713; *Wray v. Morrison* (1885), 9 O.R. 180; *Richards v. Rose* (1853), 9 Ex. 218; *Chichester v. McIntire*, 4 Bli. N.R. 78.

Tilley, in reply, referred to *In re Lucas and Chesterfield Gas and Water Board*, [1909] 1 K.B. 16; *In re Lawson and Hutchinson* (1872), 19 Gr. 84.

September 21. The judgment of the Court was delivered by HODGINS, J.A.:—The evidence leaves the same impression on my mind as it did upon the learned trial Judge. While the efforts of Garland to help on the sale to Campbell follow rather too closely on the award, indeed before its actual signature, they are capable of the explanation given in the evidence, and this is accepted by the trial Judge as affecting both the inception and subsequent ratification of the transaction. I cannot say that he is wrong in treating this whole matter as he did; and, consequently, the finding stands.

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This Court has decided that the proceedings under the leases are by way of valuation, not arbitration.* It is, therefore, unnecessary to follow the learned trial Judge in his examination of the effect of Mr. Tilley's argument before him.

Upon the question of statements not under oath being received by the valuers, and the respondent's interview with them in the absence of the appellant, I think the course taken by the parties prevents any difficulty arising on this particular score. If it be conceded that the valuers are to seek information as best they can, then it seems necessarily to follow that *ex parte* statements may be accepted and individual inquiries made. That this was the position is made clear by the evidence. Judge Barron deposes that Mr. Millar said, "You can get your information any way you like, hear whatever you like, and talk to whom you like." Mr. Garland quotes Mr. Millar in similar terms, "to get information any way he could," and admits that Millar sent a builder, Richard Smith, to him to give information as to the value of the property.

In the cross-examination of Mr. Millar this occurs:—

"Q. Judge Barron says that they were told that they could look over the buildings and ascertain the value in any way they could? A. Substantially that's right. We were discussing the functions of valuers and arbitrators."

And later he adds: "Go and see what the rents are and find out all about it. You are not a competent valuator unless you do that."

Again: "Q. Then you expected the valuers to make inquiries as to the rents then, did you? A. I expected these valuers to equip themselves to do what was right between the landlord and tenant on the wording of the lease.

"Q. In the best way they could? A. There was no other way; they could not take any evidence; what were they to do?"

There is another significant sentence: "Q. You knew the skill of these men when you were before them? A. I thought they never had any skill, and that is the reason I wanted them to get some information."

*See *Re Irwin and Campbell*, 5 O.W.N. 229.

In re-examination Millar says: "I would object to them going to Mr. Campbell or Mr. Kerr or interested people to mislead them, who might mislead them and who would be interested in misleading them. Q. Was there any discussion about that at all? A. No, I never asked."

Pickard, who valued for the respondent, corroborates the evidence I have quoted from Judge Barron and Mr. Garland.

However improper an interview with one of the parties in the absence of the other might be in the case of an arbitration, I am unable to understand why it was wrong in case of a valuation, conducted upon the above basis, to ascertain from a party interested the information which is admitted by Mr. Millar to be necessary. For he states that, if he were valuator, he would go and find out everything about it, go and look it all over, what the taxes were and what the insurance was; what the total outgo and income was; in short what the tenant ought to get for the landlord taking his buildings away from him, and he admits that substantially he told the valuers this and tried to make it plain to them. Much of the information must be sought from the tenant alone; and, if the test is that he may mislead and is interested in misleading, then the objection extends to every inquiry and includes every person, unless proved to be impartial.

Mr. Hudson in his work on Building Contracts, 3rd ed., p. 713, expresses the opinion that there is no restriction as to what a valuator may do for the purpose of making his valuation, a view that I think must be taken with some limitation.

I am reluctant to say anything that would in any way weaken the salutary rule on the subject that obtains in cases of arbitration, and do not intend to indicate that the principle may not be equally applicable in the ordinary case of valuation. But I think the doors were left so wide open as not to justify the present objection in this particular case, which must be decided upon its peculiar and unusual circumstances.

It is not necessary to ascertain the exact difference between an arbitration and a valuation. Generally speaking, a valuation is committed to a person who has skill and knowledge on the subject, so that he may apply both to the subject-matter in hand without hearing witnesses. But this definition is not exhaustive,

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for the exercising of skill and knowledge may constitute the person acting a quasi-arbitrator. See *Pappa v. Rose* (1871-2), L.R. 7 C.P. 32, 525; *Tharsis Sulphur Co. v. Loftus* (1872), L.R. 8 C.P. 1. Nor is an arbitration always to settle a disputed question. But a valuation is generally for the purpose of completing the contract engagement between two parties by fixing an amount or arriving at a like result by calculation or by an examination of work done or the inspection of definite articles.

This much may be said here, that two persons without special skill and knowledge, according to Mr. Millar, were appointed to fix the amount proper to be paid to a tenant when the landlord was taking his buildings, so as to complete the contract engagement embodied in the leases and enable the tenant to recover that amount from the landlord. And if, in doing this, they cannot inquire into the matters necessary to enable them to ascertain the proper amount, then they will be helpless, unable to take evidence, and yet debarred from obtaining as best they can the required information. The statement of the matter carries, as it seems to me, its own answer. The respondent's account of his reply to the valuers shews that he told them the amount he had originally paid, the amount of the repairs, the interest on the capital cost, his expenses in running up and down from Toronto, hotel bills, and general expenses connected therewith. The principal items in this were proper to be known to the valuers, and this is admitted by Mr. Millar.

In view, therefore, of the large latitude given to them, necessarily so under the circumstances, I am unable to find in the incident anything improper; and this applies, as well, to the statements made by the builders. I can see no difference between acquiring facts from a party himself, as in the case of the respondent, and getting it from an agent, as was done in the case of Smith when the appellant's agent sent him to Garland. And this indicates that Mr. Millar's view was the same as that of the valuers as to the sources from which information might be got.

It is hardly necessary to say that this experiment in valuation has resulted, as experiments generally do, in promoting rather than preventing litigation, and in illustrating how easy it is to cause trouble by departing from well-known methods.

A point very strongly urged was, that the valuator had proceeded upon a wrong principle or had acted upon an erroneous impression of the facts in dealing with the valuation of number 134 King street west. It was taken in and treated as an entire building. It seems that the dividing line between the Ross estate's property and that of the Baldwin estate runs through this building; and it was contended that it could not be valued as one building, but must be considered as disjointed portions of a building, and each part estimated separately.

Two answers were made to this: first, that the method adopted is in itself correct; and, second, that the parties agreed that the valuers should proceed as they did.

To understand the importance of this point to the appellant, the situation at the time of the valuation should be stated. The Baldwin estate were ground landlords of the western lots, which included the westerly 14 feet of number 134 King street. A right of renewal existed in the appellant, who was in possession of some of the houses on these lots, and had made leases of others, including number 134, demised to the respondent. The Ross estate were ground landlords of the eastern lots, which included the rest of number 134, and the appellant had by oversight lost her right of renewal, and so had to give up the buildings on the lots to the then ground landlords, on payment of their value. The appellant sold the right of renewal and the buildings on the Baldwin lots to the then ground landlords. To do this she had to acquire the buildings on it, which were under lease. The result was, that the value of the respondent's holdings, namely, 124 to 134 King street west, had to be ascertained, and this valuation was therefore begun. When the appellant had settled with the respondent (and others), she could deliver possession of all of these lots to the then ground landlords respectively. She received \$35,000 for her interest in all the houses, etc., on the Baldwin lots, and had yet to be paid for the houses, etc., on the Ross lots. And, as the then ground landlords were different people, those who represented the Ross lots would, it was feared, only have to pay for the disjointed half of number 134. Hence a depreciated valuation of the two halves of that building would be of advantage to the appellant in both cases; in the one it

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would make the profit larger, and in the other it would enable her to submit, possibly without loss, to a like valuation. While I have set out the facts, I do not think that they affect the respondent's legal rights.

There is a unity of title in the house in question as between the appellant and the respondent, but the covenants are in separate leases. The question is, can the respondent insist on a valuation upon the terms most favourable to him as against the appellant, or can the appellant compel him, when enforcing his covenants, to receive only the value depreciated by severance.

The leases to Ince, now represented by the respondent, were both dated the 20th June, 1892, and were entered into after the buildings in question had been put up. The appellant is taking advantage of the provisions of both of these leases to obtain possession of this one house, and is getting it intact. The respondent is bound to give it to her in that way, and has no way in which he can decline to part with one half. The appellant is receiving the benefit and is objecting to pay the equivalent.

I think the principle underlying the decision in *In re Lucas and Chesterfield Gas and Water Board*, [1909] 1 K.B. 16, and *Re Gibson and City of Toronto* (1913), 28 O.L.R. 20, may reasonably be followed here. The appellant is not, it is true, expropriating, but is only enforcing private rights, yet she is asking the Court to say that the valuers are entitled to exclude as an element a most important item of benefit to the appellant, which she admittedly is receiving, and which forms indeed the chief value of this individual property. She seeks to exclude her acquisition of the other half, and to secure a valuation upon a basis that is incorrect in fact, and, as I venture to think, in law as well. The words of the leases, "the amount proper to be paid," are large enough, in my judgment, to cover an award such as had been made here, and are singularly appropriate to this peculiar situation.

The principle to which I have alluded is, that the party seeking to take property cannot rely on a depreciation caused by his own act or on the assumption that he can take an attitude which will injure the value to the owner. And in this case I do not

think that the appellant can, in dealing with the 14 feet, exclude from consideration the fact that she is acquiring the other half of the building, and require the valuator to arrive at a value upon the assumption that she is receiving only part of it.

If the appellant is only to pay for each half as severed, the respondent must have the right to give the property to her in that condition, and I do not think that the judgment of Solomon is what the appellant really wants.

I am not impressed with the idea, only faintly developed in the evidence, that this severance really destroys the usefulness of the building. It is admitted that the store can be reconstructed at a reasonable cost, and an examination of the plans filed shews that 14 feet is sufficient to provide for a store and an independent entrance as well.

I have not dealt with the consent said to have been given. It is explicitly denied by Mr. Millar, though there is a quantity of testimony opposed to his recollection. It is a fact that the difficulty in fixing ground rent for the divided portions was mentioned and provided for by special agreement, and this, coupled with Mr. Millar's knowledge of the chance he ran with the ground landlords on this particular point, leads me to think that he can hardly have consented to a valuation which would obviously be unfavourable to his client in that regard. But a verbal consent, if proved, could not alter the terms of the leases under which the valuations were proceeding. Unless the view I entertain is to prevail, I think that there would be some question as to whether a misapprehension of the facts or a mistake in law by the valuator can be reviewed in an action upon the covenants in the leases such as this is, as it might be on an appeal from the award in the case of a regular arbitration, but it is not necessary to express an opinion as to it in this particular case: see *Chichester v. McIntire*, 4 Bli. N.R. 78.

With regard to the remaining questions dealt with by the learned trial Judge, I think his conclusions are correct and cannot be successfully attacked.

The appeal should therefore be dismissed with costs.

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[APPELLATE DIVISION.]

Sept. 23.

REX v. LOUIE CHONG.

Criminal Law—Indecent Assault—Evidence—Criminal Code, sec. 292.

There may be a conviction for an indecent assault (Criminal Code, sec. 292) although the act constituting the assault is not in its nature indecent. An ambiguous act may be interpreted by the surrounding circumstances and by words spoken at the time. And so, where a man took hold of a girl against her will and at the same time offered her money and invited her to go with him for an immoral purpose, a conviction for an indecent assault was sustained.

CASE stated by the Police Magistrate for the Town of Sarnia, as follows:—

“The evidence disclosed that the prisoner, a Chinaman, followed the complainant, a respectable girl of fifteen, on her way home, at a late hour of the night, overtook her at a lonesome spot, seized hold of her against her will, and offered her money (\$5) to go with him for an immoral purpose, there being neither encouragement nor consent on her part. On the contrary, she made an outcry and threatened him with arrest, whereupon he left her. She ran home and immediately made complaint to her father of what had taken place. On these facts, so found by me on the evidence, was I right in finding the prisoner guilty of an indecent assault on a female?

September 22. The case was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A., and MIDDLETON, J.

J. H. Moss, K.C., for the prisoner, argued that there cannot be a conviction for an indecent assault unless the act constituting the assault is in itself indecent in its nature; and that, on the evidence, there had been a miscarriage of justice in this case.

E. Bayly, K.C., for the Attorney-General, referred to *Rex v. Fontaine* (1914), 23 Can. Cr. Cas. 159, and argued that there was evidence of indecent suggestion, which was sufficient, taken in connection with the prisoner's act, to constitute the offence charged.

[MIDDLETON, J.:—Does not indecent assault mean an assault which has in it an element of indecency?]

Moss, in reply, argued that there must be a present indecent act in order to constitute the offence, and that the evidence did not disclose any such act.

September 23. The judgment of the Court was delivered by MIDDLETON, J.:—The point taken by Mr. Moss is, that there cannot be a conviction for indecent assault unless the act constituting the assault is in itself indecent in its nature. In this case all that was done by the prisoner was to take hold of the girl against her will. It is true that he offered her money and invited her to accompany him for an immoral purpose; but it is contended that this does not import any indecency into the laying on of the hand, which constituted the assault.

The section of the Criminal Code (292) provides for the punishment of every one who “indecently assaults any female.”

It appears to me that an act in itself ambiguous may be interpreted by the surrounding circumstances and by words spoken at the time the act is committed. Mr. Moss conceded that if a man took hold of a woman and attempted to drag her into a brothel, that would constitute an indecent assault. It is in each case a question of fact whether the thing which was done, in the circumstances in which it was done, was done indecently. If it was, an indecent assault has been committed.

The magistrate has found, and, I think, rightly found, that this man, who took hold of the girl and invited her to go with him for an immoral purpose, did indecently assault her.

Conviction affirmed.

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REID v. AULL.

Marriage—Action for Judicial Declaration of Nullity—Jurisdiction of Supreme Court of Ontario—Judicature Act, R.S.O. 1897, ch. 51, secs. 25, 26, 28, 34—Marriage Act, R.S.O. 1914, ch. 148, secs. 36, 37—Intervention of Attorney-General—Case not Falling under sec. 36—Status of Attorney-General—Application before Trial for Stay of Action—Determination of Question of Law before Trial of Issues of Fact.

The Supreme Court of Ontario has no jurisdiction to entertain an action brought for the purpose of having declared void a marriage which has been duly solemnised, unless the case can be brought under sec. 36 of the Marriage Act, R.S.O. 1914, ch. 148.

The opinion expressed in *Lawless v. Chamberlain* (1889), 18 O.R. 296, not followed.

The jurisdiction of the Court is as defined by the Judicature Act: see R.S.O. 1897, ch. 51, secs. 25, 26, 28, 34; and does not include, except as specified therein, the jurisdiction formerly possessed by the Ecclesiastical Courts in England.

An action brought in the Supreme Court of Ontario to have a marriage solemnised between the parties declared null and void and the marriage license obtained by the defendant declared illegal, fraudulent, and void, was forever stayed, upon the application of the Attorney-General for Ontario, who intervened.

It was also *held*, upon a preliminary objection raised by the plaintiff, that the Attorney-General had the right to intervene under sec. 37 of the Marriage Act, although the case did not fall within sec. 36 of the Act; that the right was not limited to intervention at the trial; and that the interests of the parties would be best served by allowing the legal question of the jurisdiction of the Court to be determined upon the Attorney-General's application, leaving the issues of fact to be tried later if it should be found that the Court had jurisdiction to entertain the action.

MOTION by the Attorney-General for Ontario for an order dismissing the action or staying all further proceedings, on the ground that the Court had no jurisdiction to entertain the action.

The motion came before MIDDLETON, J., in the Weekly Court at Toronto.

G. H. Watson, K.C., for the plaintiff, raised a preliminary objection as to the right of the Attorney-General to be heard.

Edward Bayly, K.C., and Eric N. Armour, for the Attorney-General.

No one appeared for the defendant, although notified.

Sections 36 and 37 of the Marriage Act, R.S.O. 1914, ch. 148, which are referred to below, are as follows:—

36.—(1) Where a form of marriage has been or is gone through between persons either of whom is under the age of 18 years without the consent required by section 15, in the case of a license, or where, without a similar consent in fact, such form of marriage has been or is gone through between such persons after a proclamation of their intention to intermarry, the Supreme Court, notwithstanding that a license or certificate was granted or that such proclamation was made and that the ceremony was performed by a person authorised by law to solemnise marriage, shall have jurisdiction and power in an action brought by either party, who was at the time of the ceremony under the age of 18 years, to declare and adjudge that a valid marriage was not effected or entered into.

Provided that such persons have not, after the ceremony, cohabited and lived together as man and wife, and that the action is brought before the person bringing it has attained the age of 19 years.

(2) Nothing in this section shall affect the excepted cases mentioned in section 16 or apply where, after the ceremony, there has occurred that which, if a valid marriage had taken place, would have been a consummation thereof.

(3) The Supreme Court shall not be bound to grant relief in the cases provided for by this section where carnal intercourse has taken place between the parties before the ceremony.

37.—(1) No declaration or adjudication that a valid marriage was not effected or entered into shall in any case be made or pronounced upon consent of parties, admissions, or in default of appearance or of pleading or otherwise than after a trial.

(2) At every such trial the evidence shall be taken *vivâ voce* in open court, but nothing in this sub-section shall prevent the use of the depositions of witnesses residing out of Ontario or of witnesses examined *de bene esse*, where, according to the practice of the Court, such depositions may be read in evidence.

(3) The Court may, of its own motion, require both or either

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of the parties to be examined before the Court touching the matters in question in the action.

(4) No trial shall be had until after ten days' notice to the Attorney-General of Ontario.

(5) The Attorney-General may intervene at the trial or at any stage of the proceedings and may adduce evidence, and examine and cross-examine witnesses in like manner as a party defendant, and shall have the same right of appeal from any such declaration or adjudication as a party defendant has.

May 22. MIDDLETON, J.:—The plaintiff, an infant now past 19 years of age, sues by her father, George P. Reid, alleging that a marriage ceremony which was performed on the 25th July, 1913, is void, because it was procured by deceit and fraud and through wrongful influences and misstatements of the defendant, who had procured mastery of the mind and will of the plaintiff so that she was incapable of exercising judgment and discretion; the ceremony, it is said, being performed while the plaintiff was under the influence of intoxicating drink which the defendant procured the plaintiff to take, by which she became and was incapable of reasonable thought and action. It is also alleged that the affidavit made for the purpose of obtaining the marriage license was untrue and that the license was wrongfully and illegally issued, and the ceremony was, therefore, illegally performed. It is asked that the Court declare the marriage to be null and void, and that the marriage license be also declared illegal, fraudulent, and void. The defendant has filed a statement of defence to this claim, in which he denies all impropriety on his part, and claims that the marriage was duly solemnised with the full and free consent of the plaintiff.

As no one appeared for the defendant on this motion, I am not aware whether the defendant has any intention of resisting the plaintiff's claim when the action actually comes to trial. Statements were made by the counsel for the plaintiff which indicate that no defence will be offered.

The Attorney-General has been served with notice of trial pursuant to the statute now forming part of the Ontario Marriage Act, R.S.O. 1914, ch. 148.

In the case of *Lawless v. Chamberlain* (1889), 18 O.R. 296, my Lord the Chancellor stated that the Courts of this Province have jurisdiction to declare a marriage null and void *ab initio* where it is shewn to be void *de jure* by reason of the absence of some essential preliminary. In that case it was held that there was no defect in the marriage, and the action was dismissed; and it has since been intimated, in a series of reported decisions, that this statement was a dictum only, and the contrary opinion has been more than once expressed.

The Attorney-General takes the view that our Courts have no jurisdiction to entertain an action brought for the purpose of declaring a marriage void which has been duly solemnised, unless the case can be brought under sec. 36 of the Marriage Act; and this motion is made for the purpose of having that question determined.

The Attorney-General rests his right to intervene upon the provisions found in sec. 37 of the Marriage Act. The plaintiff now contends that this statute does not give the right of intervention claimed by the Attorney-General, save in cases falling under sec. 36. That section provides that where a form of marriage has been gone through between persons either of whom is under the age of 18 years without the consent of the parent or guardian, the Supreme Court shall have jurisdiction, in an action brought by the party who was under the stipulated age, to declare and adjudge that a valid marriage was not effected or entered into; provided that the parties had not after the ceremony lived together as man and wife.

This section had its origin in an Act passed in 1907 (7 Edw. VII. ch. 23, sec. 8). Two years later, in 1909, the Act was amended by adding as sub-sections to the original of sec. 36 the provisions now found in sec. 37 in a slightly amended form (9 Edw. VII. ch. 62). In their original form the operation of these added sub-sections was, no doubt, confined to actions falling under the section itself; but in 1911 the statute was recast, and the sub-sections in question are removed from the original section and given the dignity of an independent statutory enactment (the Marriage Act, 1 Geo. V. ch. 32). As they stand now, the

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sub-sections commence by a wide provision, applicable not only to the statutory action provided for by sec. 36, but also to any case in which the intervention of the Court is sought for the purpose of declaring a marriage void: "No declaration or adjudication that a valid marriage was not effected or entered into shall in any case be made or pronounced upon consent of parties, admissions, or in default of appearance or of pleading or otherwise than after a trial."

I cannot narrow this, as contended by Mr. Watson, and make it applicable only to cases where only one of the contracting parties was under age, leaving it open in all other cases to have the marriage declared to be invalid upon consent or upon default of defence. It follows that the sub-sections which are appended to this wide declaration are equally wide in their application, and confer upon the Attorney-General the right to intervene in all cases in which a declaration of the invalidity of a marriage is sought.

Nor can I yield to the alternative argument presented by Mr. Watson. Sub-section 4 provides that ten days' notice of trial shall be given to the Attorney-General; sub-sec. 5, that "the Attorney-General may intervene at the trial or at any stage of the proceedings and may adduce evidence, and examine and cross-examine witnesses in like manner as a party defendant." Mr. Watson's contention is, that this right of intervention only allows the Attorney-General to intervene at the trial, and does not allow the making of such an application as this to stay the action.

Two answers, I think, are apparent. In the first place, there is nothing to restrict in any way the meaning to be attributed to the word "intervene." Mr. Watson contends that this litigation is the mere private concern of the parties litigant. The Legislature has thought otherwise. The public are concerned, and the Attorney-General, as representing the public, is authorised to intervene, that is, according to the meaning given that word in the Oxford Dictionary, "come in as something extraneous. . . . come between, interfere so as to prevent or modify a result." This makes it the duty of the Attorney-General to inter-

vene so as to modify the result which would otherwise be obtained in this private litigation, if he thinks the public interest demands it. Moreover, the section itself provides that the intervention may be not only at the trial but at "any stage of the proceedings."

If the Court has no jurisdiction, it seems to me that that fact should be ascertained at the earliest possible stage of the action. Upon an application to have this case heard in camera, made to my brother Latchford,* it was stated under oath that the plaintiff's health and condition was such that a cross-examination in public might seriously affect her life or reason; and it is easy to conceive that the case made by the plaintiff in her pleadings is one which ought not to be paraded in open Court if there is any real doubt of the jurisdiction of the tribunal to entertain the action. No Judge ought to be asked to pronounce an opinion upon such a matter, affecting as it must the whole future of this unfortunate young woman, unless it is plain that he has jurisdiction to deal with the action. If the finding should be adverse to the plaintiff, and it should afterwards be held that the Court had no jurisdiction, her position would be lamentable in the extreme. Scarcely better would be her situation if the finding upon the facts should be in her favour.

These considerations point to the propriety of separating the trial of the question of fact from the hearing upon the question of law. Speaking generally, the policy of our law of recent years has been entirely against the separation of the issues in law from the trial of the questions of fact; but the Rules still provide for this, leaving it to the Judge in each case to determine whether the questions should be so separated. It appears to me that this case is one of the few in which the interests of the parties will be best served by determining this much-debated legal question in the way suggested.

The fact that the latest reported decisions seem to be against the existence of the jurisdiction also points to the adoption of this course; because they render it probable that the Judge before whom the case comes for hearing would investigate the legal

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*See *Reid v. Aull* (1914), 5 O.W.N. 964.

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aspect of the case in the first instance, and, if he considered himself bound by the reported cases, he would not express an opinion upon the question of fact if he was satisfied that he had no jurisdiction, and a new trial would almost inevitably result, as an appellate Court would hesitate long before dealing with questions of fact of this nature, depending upon the weight to be given to the evidence of witnesses which it had no opportunity of seeing or appraising.

The merits of this legal question not having been discussed before me, I do nothing more now than determine that the preliminary objection taken must be overruled, and the motion must be heard upon its merits at some convenient day. Unless the parties agree otherwise, I fix Saturday the 30th May, at ten o'clock, for the continuation of the argument.

June 6. The motion was heard upon the merits.
The same counsel appeared.

September 23. MIDDLETON, J.:—The preliminary question as to the status of the Attorney-General to intervene under the statute has already been argued and determined.

For the purpose of this motion the facts alleged by the plaintiff must be taken to be truly stated. The facts are sufficiently set forth in my judgment dealing with the preliminary objection.

In *Lawless v. Chamberlain*, 18 O.R. 296, my Lord the Chancellor investigated the jurisdiction of the Court and concluded that the Court had jurisdiction to declare the nullity of a marriage which had been procured by fraud or duress in such wise that it is void *ab initio*, though the Court had no jurisdiction to dissolve a marriage once validly solemnised, this being not of judicial but legislative competence. In that case my Lord found that the facts proved did not justify the decree sought; hence what was said with reference to the jurisdiction of the Court has sometimes been regarded as dictum only. Other cases (*e.g.*, *May v. May* (1910), 22 O.L.R. 559) have, it seems to me, determined that our Courts have not the jurisdiction suggested; and

I have, therefore, thought it right that I should investigate the matter independently rather than deal with the case solely in reliance upon the cases in our own Courts cited.

It is to be borne in mind that there is a fundamental distinction between the granting of a divorce and the relief here sought. This distinction is very clearly brought out in an article in 26 Harvard Law Review, p. 252. Divorce assumes the previous existence of the marriage status. Its result is to put an end to that status without affecting its existence in the past. The allegation here is that there never was in truth a marriage, and what is sought is a judicial declaration to that effect. It is not in this action sought in any way to affect the status of the plaintiff. She simply seeks to have her status declared.

The view entertained in *Lawless v. Chamberlain*, and pressed by Mr. Watson, is that our Court has jurisdiction to grant such a decree. The distinction was recognised by the Chancellor in the case of *T—— v. B——* (1907), 15 O.L.R. 224, where a declaration of invalidity was sought by reason of the alleged incapacity and impotence of one of the contracting parties. Following a decision of Sir J. P. Wilde in the Ecclesiastical Court, who said, "It may be safely asserted that the question of impotence as a ground of nullity has never yet been raised in the temporal courts. . . . A suit for the purpose of obtaining a definitive decree declaring a marriage void which should be universally binding, and which should ascertain and determine the status of the parties once for all, has, from all time up to the present, been maintainable in the Ecclesiastical Courts or the Divorce Court alone" (*A. v. B.* (1868), L.R. 1 P. & D. 559, 561), the Chancellor distinguished the case then in hand from *Lawless v. Chamberlain*, upon the ground that in that case it was said that "both parties were under age, and the ground of complaint was that the consent had been procured by duress and intimidation, and that there had been no coming together of the parties afterwards either in domestic or marital relations."

The jurisdiction of the High Court is found by reference to the Judicature Act as contained in R.S.O. 1897, ch. 51. By sec. 25, the Court is, in the first place, given such powers and

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authorities as by the law of England are incident to a Superior Court of civil and criminal jurisdiction, and is given specifically the rights and privileges exercised by the Superior Courts of Common Law at Westminster on the 5th December, 1859. By sec. 26, the Court is also given the like jurisdiction and powers as by the laws of England were on the 4th March, 1837, possessed by the Court of Chancery, in respect of certain enumerated matters, including, *inter alia*, all cases of fraud and accident and all matters relating to . . . dower, infants, idiots, lunatics and their estates. None of the other enumerated matters have any bearing upon the matter now under consideration. By sec. 28, the Court is given jurisdiction as a Court of Equity to administer justice where there is no adequate remedy at law; and, by sec. 34, jurisdiction is conferred in actions for alimony.

In England the question is free from doubt or difficulty, as, by the statute relating to divorce and matrimonial causes, 20 & 21 Vict. ch. 85, assented to on the 28th August, 1857, all jurisdiction then exercisable by any Ecclesiastical Court in England in respect of divorce *à mensâ et thoro*, suits of nullity of marriage, suits of jactitation of marriage, suits for restitution of conjugal rights, and in all causes, suits, and matters matrimonial, is taken away from the Ecclesiastical Courts and vested in the new "Court for Divorce and Matrimonial Causes" thereby constituted; and it is provided that no other Court shall thereafter exercise any jurisdiction with respect to these matters.

Where a marriage was alleged on the one side and denied on the other, as already pointed out, a suit to annul the marriage would be inappropriate, as that assumed a valid marriage ceremony at least. The suit for jactitation of marriage was brought for the purpose of obtaining a judicial declaration that a lawful marriage did not subsist between the parties. This action could, prior to the Act of 1857, be brought only in the Ecclesiastical Courts. What is sought here is really to permit such an action to be brought in our High Court. It is sought to have it established that this portion of the jurisdiction of the Ecclesiastical Courts can now be exercised by this Court.

As the Act of 1857 had deprived the Common Law Courts of all possible claim to such jurisdiction before the 5th December, 1859, the jurisdiction, if it exists in a Court, must be derived through the sections conferring equity jurisdiction. In *Lawless v. Chamberlain*, the Chancellor adopted the view expressed in certain judgments of the early Chancellors in the State of New York, that the Court of Equity had an inherent jurisdiction over the matters generally entertained by the Ecclesiastical Courts, this jurisdiction remaining latent, the Court of Equity permitting it to be exercised exclusively by the special tribunals which entertain matrimonial causes. Consistently with this, when the "Courts Christian" were abolished during the Protectorate, the ancient jurisdiction of Chancery was revived and exercised: Tothill, Rep. 61; *Anon.* (1683), 2 Shower R. 282 (case 269).

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This is a fair statement of the views entertained by the New York Chancellors; but it appears to me that it is not conclusive when it is sought to apply it to the state of affairs existing here, as this latent residual jurisdiction of the Court of Chancery has never been vested in our Courts. Our Courts were given all the jurisdiction of the English Common Law Courts, but only part of the jurisdiction of the Court of Chancery, and I think it must be taken that no portion of the latent Ecclesiastical jurisdiction, if in truth it existed, ever became vested in our Courts. The argument proves too much: for, if any part of the Ecclesiastical jurisdiction was in that way transferred to our Courts, it must all have been transferred, and our Courts would be entitled to entertain suits for divorce and restitution of conjugal rights as well as for jactitation of marriage. Indeed, the Courts of Chancery in New York and other States, on this reasoning, claim to have, and have asserted, full Ecclesiastical jurisdiction. That our Legislature did not intend in this indirect way to give the Court the full Ecclesiastical jurisdiction is plain from sec. 34, which expressly gives jurisdiction to award alimony.

It is also suggested in *Lawless v. Chamberlain*, and is argued by Mr. Watson, that the jurisdiction which our Court undoubt-

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edly has to make a declaratory decree enables the Court to deal with this matter. This is to ignore the principle laid down in *Barraclough v. Brown*, [1897] A.C. 615, and many other cases, that a declaratory decree should only be made with respect to matters properly falling under the cognisance of the Court. The power to make declaratory decrees conferred by the Legislature is not to be exercised in respect of matters over which the Court has no general jurisdiction or which the Legislature has seen fit to intrust to other tribunals.

Mr. Watson cited a great many cases which I need not deal with in detail, but of which *Regina v. Secker* (1857), 14 U.C.R. 604, *Regina v. Bell* (1857), 15 U.C.R. 287, and *Hodgins v. McNeil* (1862), 9 Gr. 305, may be taken as illustrations. In these cases the Common Law Courts or the Court of Chancery, for the purpose of determining a matter properly before them, were called upon to determine the validity of a marriage. This clearly affords no foundation for the bringing of an action such as this. If a man is indicted for bigamy, the Court must determine the fact of marriage. If a widow sues for dower, her marriage must be ascertained. But nowhere, save in *Lawless v. Chamberlain*, is there, as stated by Sir J. P. Wilde in the passage already quoted, any precedent for the bringing of such an action as this except in the Ecclesiastical Courts or other Court given matrimonial jurisdiction.

For these reasons, I think it is clear that the motion succeeds, and the action must be forever stayed.

It is not a case for costs.

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CROZIER v. TREVARTON.

Oct. 5.

Landlord and Tenant—Lease—Surrender—Acceptance by Reletting—Eviction—Forfeiture of Rent Accrued—Apportionment of Rent—Apportionment Act, R.S.O. 1914, ch. 156, sec. 4—Payment for Occupation for Broken Period—Agreement—Deduction for Improvements—Costs.

The plaintiff on the 25th October, 1906, leased a farm to the defendant for ten years. The defendant did not get possession under the lease until the 1st March, 1907, and remained in possession only until about October, 1908, and paid only half a year's rent. When the defendant gave up possession, he notified the plaintiff, and the plaintiff relet the farm in April, 1909, without notifying the defendant that the reletting was on his account:—

Held, that this amounted to an acceptance of the surrender and an eviction of the defendant.

Walls v. Atcheson (1826), 3 Bing. 462, followed.

While under the common law rent is not due for any intermediate broken period, and the rent accruing is forfeited by re-entry before the gale-day, that result has been changed by the clause in the Apportionment Act (now R.S.O. 1914, ch. 156, sec. 4), providing that all rent is to be regarded as accruing due from day to day.

Hartcup & Co. v. Bell (1883), Cab. & El. 19, followed.

And the plaintiff was *held* entitled to recover a sum of money, upon the basis of the rent reserved, for the period of the defendant's actual occupation and for the period between his going out and the incoming of the new tenant, less the gale of rent paid and less an allowance for money expended and work done by the defendant upon the demised premises, pursuant to an agreement between the parties; the plaintiff to have costs on the County Court scale, with the usual set-off to the defendant.

THE plaintiff's claim in this action was for damages for breach of a covenant contained in a lease of a farm, made by the plaintiff to the defendant on the 25th October, 1906, for ten years from the 1st November, 1906, wherein the defendant covenanted with the plaintiff to pay him rent during the term at the rate of \$250 per year for each of the first two years and at the rate of \$270 per year for each of the last eight years.

The plaintiff alleged that the defendant entered into possession of the farm under the lease and paid the rent which fell due on the 1st November, 1907, and the 1st May, 1908, and abandoned the premises in the autumn of 1908, without the consent or knowledge of the plaintiff, and had not since paid the plaintiff any further rent; that on the 23rd April, 1909, the plaintiff leased the farm to one Lamb for one year at a rent of \$100, and to three other persons subsequently for short terms; that the rents which he thus obtained were the best obtainable,

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and that he had great difficulty in securing tenants; and that he sold the farm in September, 1912.

The plaintiff claimed damages in the sum of \$848.29, made up of the semi-annual gales of rent from the 1st November, 1908, to the 1st November, 1912, with interest, deducting the rents received from the four tenants.

The defendant alleged that the plaintiff induced him to take a lease of the farm by representations as to the same and the state of cultivation and productiveness thereof and the state of repair of the buildings thereon and by promises as to the repair of the buildings; and that, such representations being untrue, and the plaintiff not keeping his promises, the defendant was obliged to discontinue the occupation of the farm, and accordingly left it before the end of the term created by the lease, and surrendered it to the plaintiff,

The defendant further alleged that, prior to the lease, an agreement between the parties was made, which was reduced to writing by the plaintiff and signed by the defendant, as to the basis of the lease; and the lease, which was drawn by the plaintiff, should have been, and was represented by the plaintiff to be, drawn in accordance with the agreement; but the lease was not so drawn; and the defendant, relying on the plaintiff in drawing the lease and his representation that the lease was drawn in accordance with the agreement, and without any independent advice, signed the lease; and the lease was not the agreement and covenant of the defendant.

The defendant further alleged that the plaintiff kept the agreement, and the defendant had not a copy of it, and, though he had asked the plaintiff for a copy, the plaintiff had neglected and refused to furnish one.

The defendant also alleged that the farm, at the commencement of his term, was in the occupation of a former tenant of the plaintiff, whose term did not expire until the 1st March, 1907, and the defendant did not obtain possession until about five months after the commencement of his term.

The defendant further alleged that, at the request of the plaintiff he did and paid for certain work and materials in the repair and improvement of the buildings on the farm, and by

such work and material paid the plaintiff for his (the defendant's) occupation, and was not indebted to the plaintiff.

The defendant further alleged that the plaintiff accepted and took possession of the farm upon the defendant removing therefrom, and treated the term as at an end.

The defendant maintained that, by reason of his not getting possession of the farm at the time mentioned in the lease, he was not liable for the rents thereby reserved; and he submitted that the action should be dismissed.

September 29. The action was tried by Boyd, C., without a jury, at Toronto.

F. Arnoldi, K.C., for the plaintiff.

H. S. White, for the defendant.

October 5. BOYD, C.:—This case has much of contradiction and inconsistency, and all I can do is to feel my way to a fair conclusion. The defendant, being a mason by trade, undertook to lease the farm in question from the plaintiff, who is a lawyer, through the medium of the plaintiff's brother, who is also a lawyer. The farm was sadly out of repair, and the house was uninhabitable, and an agreement was drawn by the plaintiff's brother, acting also for the defendant, by which provision was made for doing various repairs and betterments on the land. This agreement was kept by the plaintiff—no copy furnished the defendant, though he says he repeatedly applied for a copy—and it is now lost. The only evidence is, that the lease is in conformity to that agreement, as stated by the plaintiff and his brother, as against the statement of the defendant that it is not so drawn. My strong impression is, that the defendant was to do or to have done much more work than is admitted by the plaintiff, in many parts of which he (the defendant) was to render service as a mason, and for which he expected and understood he was to be paid or to have it allowed on the rent. This is confirmed by the fact that he gave a detailed account of his services and outlay to his solicitor from time to time as furnished and made. By the terms of the lease he was to get full possession on the 1st November, 1906; but the farm was then in possession

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of another tenant, Conlin, who paid rent to the plaintiff down to the 1st March, 1907. Not till that date did the defendant get full possession, and thereafter he went on to make the house habitable. He is corroborated in this by the former tenant—who did not live on the place. He expended according to Ebbels' account, \$109.20 in betterments, and he also paid others for work done on the building, etc., the sum of \$59.89. He kept possession from March, 1907, till about October, 1908, in all one year and seven months, and paid rent in July, 1908, to the extent of \$125. The lease was for ten years at \$250 for the first and second years. He was losing money in the place—found it impossible to live there, and vacated possession and went back to his former abode, and so notified the landlord by letter.

There was no personal communication between the parties—the brother was the medium in respect to the doing of the work and ordering supplies and so on.

The landlord, without any word of any kind to the tenant, entered into possession in April, 1909, and rented the place then to a tenant, and afterwards, in the same *ex parte* manner, to three other tenants, till finally he sold the place in September, 1912.

The only letter, he says, he sent to the defendant was on the 30th November, 1908, after the place had been vacated, claiming as due under the lease \$389. For some unexplained reason, the plaintiff in his pleading says that all rent was paid up to the 1st November, 1907, and to the 1st May, 1908. The first item of his detailed claim is for half a year's rent due the 1st November, 1908, a month after the defendant had left the farm. Under the circumstances and considering the situation and capacities of the parties, I declined to allow an amendment of this.

The chief claim is for damages for non-payment of rent down to the sale of the farm in 1912. This claim fails clearly upon the facts of this case. The plaintiff, being notified that the place was vacant and that the defendant had left, accepted that surrender by reletting the farm in April, 1909. That transaction operated as an eviction of the defendant, in the absence of notification to the contrary given to the defendant. The plaintiff might have preserved his claim under the defendant's lease by

proper warning, such as that he was reletting on the former tenant's account, given to the defendant—but he undertook to enter on and lease the farm to others, to the extinction of the defendant's term of years.

The law is well-settled on this head by the case of *Walls v. Atcheson* (1826), 3 Bing. 462, cited and relied on in Halsbury's Laws of England, vol. 18, p. 549.

Not so clearly settled is the point as to how much rent the defendant must pay. His actual occupation was one year and seven months, and before the next gale-day (May) the plaintiff had rented the farm to the new tenant. Under the common law the rent was not due for any intermediate broken period, and the rent accruing would have been forfeited by the re-entry before the gale-day. That is laid down in *Hall v. Burgess* (1826), 5 B. & C. 332, also cited in Halsbury (vol. 18, pp. 480, 486). But it is said, and the better opinion appears to be, that the Apportionment Act has changed this result: so that rent is held to be payable *de die in diem*, and so apportionable as to the broken period.

There is dearth of direct decision, but the situation is thus treated in Halsbury's Laws of England, vol. 18, p. 480, note (h): "Formerly where the reletting took place between two rent days, the landlord could not recover the rent from the previous rent day up to the reletting; but apparently the rent would now be apportionable for this purpose." That volume was published in 1911. In 1914, Foa's last (5th) edition of his Landlord and Tenant puts the point more decidedly (see pp. 117, 118): "Where a tenant left on a quarter day without notice, and the landlord let the premises to another tenant during the following 'period,' no rent could be recovered for the time up to such fresh letting." By virtue of the Apportionment Act "it is thought that rent could be recovered down to such reletting, although that reletting would amount to an eviction" (p. 118).

The case of *Hartcup & Co. v. Bell* (1883), Cab. & El. 19, accepted and followed by the Irish Court in *Elvidge v. Meldon* (1888), 24 L.R. Ir. 91, seems to justify the conclusion that the clause in the Apportionment Act (as it now appears in R.S.O. 1914, ch. 156, sec. 4), making all rent to be regarded as accruing

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due from day to day, enables the landlord to collect, and renders the tenant who has withdrawn liable to pay, rent up to the time when the landlord puts in a new tenant. In such a case the old tenancy is determined by operation of law except when the letting by the landlord is on the tenant's account, and the latter has notice to that effect. The defendant should in fairness pay for his actual occupation, about a year and seven months, and also for the period between his going out and the incoming of the new tenant, for which I would fix as a fair amount the sum of\$520.00

Deduct from this cash paid....\$125	\$125.00
Work done, etc., as noted by Ebbels	109.20
And cash paid for work as by receipts put in	59.89 \$294.09
	<hr/>
	\$225.91

Judgment for the plaintiff for \$225.91. Costs to the plaintiff on the lower scale. Costs of defence on the higher scale, to be deducted from what is due for claim and costs to the plaintiff; and let the balance be paid to the plaintiff.

—

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Oct. 6

[APPELLATE DIVISION.]

LANGDON-DAVIES MOTORS CANADA LIMITED v. GASOLELECTRIC
MOTORS LIMITED.

Summary Judgment—Motion for—Practice—Rules 56, 57—Affidavit of Defendant Filed with Appearance—Cross-examination—Affidavit of Plaintiff in Support of Motion.

Under the new practice introduced by Rules 56 and 57, where the writ of summons is specially endorsed, the plaintiff may move for summary judgment without cross-examining the defendant upon the affidavit filed with his appearance; and, if the affidavit does not disclose a good defence nor set out facts and circumstances sufficient to entitle the defendant to defend, judgment will be granted to the plaintiff. An affidavit filed by the plaintiff in support of his claim, though it may not be necessary, is unobjectionable. Rule 57 does not alter the practice laid down in *Jacobs v. Booth's Distillery Co.* (1901), 85 L.T.R. 262—upon a motion under that Rule the Court does not attempt to determine facts in issue upon controversial affidavits. Judgment of DENTON, J. (C.C.J., York, affirmed.

APPEAL by the defendants from an order of DENTON, J. (C.C.J., in an action in the County Court of the County of York,

allowing the plaintiffs to enter judgment under Rule 57 of the Rules of 1913.

The action was brought for the recovery of money, and was commenced by a writ of summons specially endorsed under Rule 33.

Rule 56 provides that "where the writ is specially endorsed the defendant shall with his appearance file an affidavit that he has a good defence upon the merits and shewing the nature of his defence, with the facts and circumstances which he deems entitle him to defend the action, and shall forthwith serve a copy of such affidavit upon the plaintiff. . . ."

The defendants appeared and filed an affidavit of an officer. The plaintiffs did not cross-examine the deponent upon the affidavit, but made a motion for summary judgment under Rule 57, and filed an affidavit in support of the motion.

Rule 57 provides that "where the defendant appears to a writ specially endorsed and files the affidavit required by Rule 56, the plaintiff may cross-examine upon such affidavit and move for judgment, and if the Court is satisfied that the defendant has not a good defence to the action on the merits, or has not disclosed such facts as may be deemed sufficient to entitle him to defend the action, judgment may be given for the plaintiff. . . ."

The County Court Judge heard the motion and gave judgment for the plaintiffs; the defendants appealed.

September 29. The appeal was heard by MACLAREN, MAGEE, and HODGINS, JJ.A., and MIDDLETON, J.

J. F. Boland, for the appellants, contended that the particulars of the plaintiffs' claim were insufficient; that a plaintiff must cross-examine upon the affidavit of the defendant; and that a plaintiff has no right to support a motion for judgment by an affidavit.

W. J. Elliott, for the plaintiffs, respondents, argued that their proceedings were regular, and that the defendants' affidavit disclosed no defence.

October 6. The judgment of the Court was delivered by MIDDLETON, J.:—The defendants appeal from an order of Denton, Co. C.J., granting judgment under Rule 57.

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We reserved judgment in this case not because it involves any difficulty, but for the purpose of removing some misapprehension as to the scope and effect of the Rule in question.

The plaintiffs sued by a writ which was specially endorsed. The defendants, as required by Rule 56, filed an affidavit, but the affidavit filed did not disclose any defence whatever upon the merits, nor did it set out any facts and circumstances sufficient to entitle the defendants to defend the action. Thereupon the plaintiffs moved for judgment under Rule 57, filing an affidavit verifying their cause of action. No further affidavit was filed in answer.

The defendants rely upon certain technical objections, which appear to us to be entirely ill-founded.

First, it is said that the plaintiff was not entitled to move for judgment without having cross-examined the defendants' officer upon his affidavit. We do not think that this is the effect of the Rule. Upon an affidavit being filed, the plaintiff, if he sees fit, may cross-examine, or, if he sees fit, he may move for judgment upon the ground that the affidavit does not upon its face disclose a defence.

The whole policy of the Rule is to relieve the plaintiff from the obligation of proceeding in the dark and compelling him to launch a motion before he has ascertained by the defendant's oath whether the defendant has any *bonâ fide* defence which he desires to urge, and without the further opportunity of testing the *bona fides* of the defendant by cross-examination upon his affidavit.

Another objection taken was to the filing of an affidavit by the plaintiffs. The Rule does not make any change in the practice laid down in *Jacobs v. Booth's Distillery Co.* (1901), 85 L.T.R. 262. Upon a motion under this Rule the Court does not attempt to determine facts in issue upon controversial affidavits.

The fate of the motion depends upon what the defendant himself sets up; and, while it may not be necessary for the plaintiff to file any affidavit, the fact that he has filed an affidavit pledging his belief in his own claim is certainly unobjectionable.

The appeal fails and must be dismissed with costs.

[IN CHAMBERS.]

1914

Oct. 23.

DUMENKO v. SWIFT CANADIAN CO. LIMITED.

*Alien Enemy—Action by, Begun before War—Residence in Hostile Country
—Security for Costs — Stay of Proceedings — Dismissal of Action—
Effect of.*

The plaintiffs, residing in Austria and subjects of the Emperor of Austria, began this action before a state of war existed between the Emperor and his Britannic Majesty, and were ordered to give security for costs. Their solicitor, not being able to communicate with them after the war began, and no further proceedings having been taken, applied for an extension of time and for a stay of proceedings, in order to avoid the dismissal of the action which followed upon failure to give security. This was refused; and it was *held* (upon an application in Chambers by the defendants), that the plaintiffs, having become alien enemies, ought to be barred from further prosecution of the action, which was dismissed; but, *semble*, the dismissal of the action at this stage would not be a bar to a subsequent action after the termination of the war.

Le Bret v. Papillon (1804), 4 East 502, and *Brandon v. Nesbitt* (1794), 6 T.R. 23, followed.

THIS action was begun in the Supreme Court of Ontario on the 29th July, 1914, by Fedko Dumenko and Anna Dumenko, plaintiffs, against the defendant company.

By an order made upon *præcipe*, on the application of the defendants, dated the 31st July, 1914, reciting that it appeared by the endorsement on the copy of the writ of summons served on the defendants that the plaintiffs resided at Strutyn Nizny, Galicia, Austria, out of the jurisdiction of the Supreme Court of Ontario, the plaintiffs were required to give security for costs within four weeks.

By an order made by the Master in Chambers on the 21st September, 1914, upon the application of the defendants for an order dismissing the action for non-compliance by the plaintiffs with the order for security for costs, the time for giving security was extended until the 19th October, 1914; and it was further ordered that upon default of such security being given by the plaintiffs the action should stand dismissed without further order upon the filing of an affidavit by the defendants' solicitor that such security had not been given.

On the 10th October, 1914, the plaintiffs' solicitors served notice of a motion "for an order staying all proceedings in this

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action so long as may be ordered by the Court or for such further and other order as to the said Court may seem meet and just."

In support of this motion there was filed an affidavit of one of the solicitors for the plaintiffs, sworn on the 10th October, 1914, in which it was stated that the action was brought to recover from the defendants damages for the death of their son Iwan (John), a workman in the employ of the defendants, who sustained personal injuries while in their employ, resulting in his death on the 14th May, 1914, at Toronto; that the plaintiffs, the parents of the deceased, resided at Strutyn Nizny, Galicia, Austria, and were, as the deponent believed, subjects of the Austrian Emperor; and that, owing to the present state of European hostilities, it was impossible to communicate with the plaintiffs, and the plaintiffs' solicitors had heard nothing from the plaintiffs since the outbreak of the war.

On the 15th October, 1914, the defendants' solicitors served notice of a motion for an order dismissing the action, on the ground that the plaintiffs were alien enemies, they being Austrian subjects and now in a state of war with Great Britain.

October 16. The plaintiffs' motion and the defendants' cross-motion were heard by FALCONBRIDGE, C.J.K.B., in Chambers.

O. H. King, for the plaintiffs.

Gideon Grant, for the defendants.

October 23. FALCONBRIDGE, C.J.K.B.:—The plaintiffs are inhabiting and commorant (*per* Lord Ellenborough, C.J., in *Le Bret v. Papillon* (1804), 4 East 502, at p. 506) in Austria under the allegiance of the Emperor of Austria, between whom and our King a war has been commenced and is now being carried on. The plaintiffs are, therefore, enemies of the King. At the time when they brought this action, they, as well as the Emperor, were at peace and in amity with our King and his subjects.

On the 31st July, the defendants obtained the usual præcipe order for security of costs. On the 21st September, the Master in Chambers made an order extending the time for the giving of security by the plaintiffs until Monday the 19th October, and further ordering that, in default of such security being given,

this action should stand dismissed. The plaintiffs now move in Chambers for an order staying all proceedings so long as it may be ordered, or for such further or other order as may seem meet or just.

The defendants gave notice that on the return of the plaintiffs' motion they would move that the action be dismissed on the ground that the plaintiffs are alien enemies.

As to the plaintiffs' notice of motion, I cannot see why the plaintiffs ought to be in any better position by reason of their having become alien enemies than they would be under ordinary circumstances; and their motion is, therefore, dismissed, and the dismissal of the action follows in pursuance of the Master's order.

As to the defendants' motion, it is quite clear upon the authorities that the plaintiffs, having become alien enemies, ought to be barred from further having and maintaining this action. See *Le Bret v. Papillon*, 4 East 502; *Brandon v. Nesbitt* (1794), 6 T.R. 23; Mews' Digest, vol. 8, pp. 210, 211.

The plaintiffs' action is, therefore, on this ground also, dismissed with costs. This dismissal is not necessarily—and I do not mean it to be—a bar to a subsequent action in respect of the same matter after peace shall have been declared: Holmested & Langton's Judicature Act, 3rd ed., p. 636.

[IN CHAMBERS.]

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Oct. 30.

*Criminal Law—Murder—Application for Bail after True Bill Found—
Postponement of Trial at Instance of Crown.*

The single proper purpose of detaining an accused person in close custody is to insure his trial in due course; and in all applications for bail, resting in the discretion of a Court or of a judicial officer, in criminal cases, the paramount question should be, whether the presence of the accused person for trial in due course would be assured if the application were granted.

The circumstances to be taken into consideration pointed out.

And in this case, where a true bill had been found against the accused, who was charged with murder, although his trial had been postponed at the instance of the Crown, he being ready for trial, and although it was represented by counsel for the accused that the case for the Crown was

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not a strong one, bail was, having regard to all the circumstances, refused.

There is, however, no hard and fast rule that in a case of murder, the accused will not, after bill found, be admitted to bail.

Regina v. Chapman (1838), 8 C. & P. 558, explained.

Regina v. Keeler (1877), 7 P.R. 117, and *Regina v. Mullady* (1868), 4 P.R. 314, followed.

MOTION on behalf of a prisoner, against whom a true bill for murder had been found, for bail.

October 6 and 25. The motion was heard by MEREDITH, C.J. C.P., at the Guelph assizes and in Chambers at Toronto.

C. L. Dunbar, for the prisoner.

Edmund Meredith, K.C., and *Edward Bayly*, K.C., for the Crown.

October 30. MEREDITH, C.J.C.P.:—The inclination of my judgment, when this application was first made, was, and, but for the decided cases, of the same character as this case, would still be, to let the prisoner to bail, if bail of a very substantial character were given.

As I understand the subject, the single proper purpose of detaining an accused person in close custody is to insure his trial in due course; if that were as certain without as with imprisonment there would be no good reason for any imprisonment until after a conviction.

A person in close custody must be sometimes more or less hampered in preparing for his trial; the advantage is with the prosecution.

And, except to insure the accused person's presence for trial, there would be an anomaly in making a prisoner, before trial, of one who, in the eyes of the law, is deemed innocent until tried and convicted.

But this theoretical anomaly in the criminal law is a practical necessity: without imprisonment until trial a vast number of accused, and of guilty, persons would try to cheat justice by evading a trial.

So that in all applications for bail, resting in the discretion of a Court or of a judicial officer, in criminal cases, the para-

mount question should be, whether the presence of the accused person, for trial in due course, would be assured if the application were granted: if that cannot be made sure by other means, then there is no other proper course but detention in close custody.

In determining whether a trial in due course would ensue without such detention, several circumstances must be taken into consideration, such as: the nature of the offence charged; the extent of the punishment that might follow upon a conviction; the nature of the evidence likely to be adduced at the trial, and so the probability of conviction or of acquittal; the character of the accused person, and of the ties, if any, which are likely to bind him to remain in the country and stand his trial; and the speed or sloth in which the prosecution is being carried on; as well as any other circumstances likely to affect the accused person's fear of conviction or confidence of acquittal: and his chances in an attempt to escape from trial.

The statute-law, in favour of a prisoner, bearing upon this subject, must also of course be borne in mind: I refer especially to the provisions contained in sec. 6 of the Habeas Corpus Act—31 Car. II. ch. 2 (R.S.O. 1897, vol. 3, p. xxxix.); and sec. 699 of the Criminal Code, R.S.C. 1906, ch. 146.

In cases of murder, and the more so after a preliminary investigation, by a judicial officer, an investigation which ought to be thorough, and at which the accused person has the right to give any such relevant evidence as he chooses, and after a commitment for trial as the result of that investigation—and still more so in cases such as this, in which a true bill has been found also—the rule is, and should be, that the accused person should not be admitted to bail: the temptation to escape from a trial in such a case being too great to leave much, if any, great hope that bail to any amount would overcome it. But there well may be some exceptions to that rule, including the statutory one contained in the Habeas Corpus Act: see *Regina v. Bowen* (1840), 9 C. & P. 509.

And, having regard to all the circumstances of this case, including of course the fact that the prisoner was ready for and desired trial at the last Wellington assizes, the inclination of

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my judgment was, as I have said, to consider this case an exception to the rule; but I am now obliged to say that that inclination does not seem to run quite parallel with the decided cases; and it is a thing of great importance that there should be uniformity of practice in this respect; that the same rule should be applied to all accused persons in the like manner; that there should be no reason given for any one to think that it might depend upon the particular Judge applied to whether such an application as this failed or succeeded.

In the case of *Regina v. Chapman* (1838), 8 C. & P. 558, the Chief Baron, Lord Abinger, at an Oxford assizes in the year 1838, seems to have said that in no case of murder, after bill found, should the prisoner be admitted to bail. And that too was a case like this, in which, at the instance of the Crown, the trial had been put off until the next assizes. But I cannot think any such hard and fast rule was intended to be laid down. I treat the language of the learned Chief Baron as having been inspired by the facts of the case he was considering, and to be applicable to cases of like circumstances. I should add too that that case was made stronger for the applicant, because bail to any amount that might be required was offered.

In the cases in the Courts of this Province, of *Regina v. Keeler* (1877), 7 P.R. 117, and *Regina v. Mullady* (1868), 4 P. R. 314, in each of which the question of granting or refusing the application was treated not as subject to any hard and fast rule, but as being in the judicial discretion of the Court, there were circumstances so much like those of this case that I cannot doubt that, had this very case come before either of the Chief Judges who decided those cases, the application would have been refused, as it was in each of the cases I have mentioned.

In the earlier case, no bill had been found, and one assizes had passed without a bill having been preferred; and these observations of the learned Judge who decided that case are quite applicable to this case, even if Mr. Dunbar's contention, that, as far as it has been disclosed, the case for the Crown is not a strong one, were true: "I am compelled to say that, after going through the depositions, I think they contain a strong *primâ facie* case, though one which, if there be additional evidence, I think ought

not to have been tried without it, or until proper efforts to procure it have been made and have failed." I have been obliged to quote the whole sentence in order to make the latter part, to which I refer, and have underlined, intelligible.

In the later case, a true bill had been found, and one assizes had passed without bringing the prisoners to trial: and the concluding words of the learned Judge in refusing the application in that case are applicable to this case; they are: "The charge against them is murder. The sentence, if guilty, is death. There is evidence which would"—I would say might—"justify a finding of guilty. I do not say that a jury ought on the evidence to find any one of the prisoners guilty. I only say it is competent for a jury to do so. Looking at the serious character of the charge, the dreadful sentence that must follow a conviction; the fact that there is evidence against each of the prisoners: the fact that only one assize has elapsed without a trial, and that a true bill was found at that assize, I think that it would be more prudent for me to abstain from the exercise of, than to exercise, the power which I possess of bailing the prisoners. I leave them, if necessary, to their remedy under the Habeas Corpus Act."

The strictness of the practice against admitting to bail in murder cases under ordinary circumstances, especially after bill found, is maintained through all the cases, that I have read, in this country, in England, in Ireland, and in the United States of America; and, though it may be that, having regard to the growing wider range and efficiency of the extradition laws generally, and other circumstances making escape from justice more difficult, as well as growing greater regard for the liberty of the subject not convicted of crime, that strictness may be somewhat mitigated in time, the cases as they stand compel me to refuse this application now; but that will not prevent a further application being made and being successful, if other circumstances arise favouring it sufficiently to admit the prisoner to bail without disregarding the decided cases.

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[APPELLATE DIVISION.]

June 24.
Oct. 1.

PERRY v. BRANDON.

Contract—Rent of Plant at Sum per Diem—Computation of Days—Construction of Written Agreement—Inclusion of Sundays.

The plaintiff rented to the defendants a certain plant; the rental stipulated in the written agreement was \$62 per day, "to start immediately on outfit leaving main line and to run each and every day until the work is complete:"—

Held (CLUTE, J., dissenting), that, in computing the number of days to be paid for, Sundays were to be included.

The provision in the contract "one day to constitute ten hours" was for the purpose of determining what should be paid in the event of the plant being worked longer than ten hours.

Judgment of MIDDLETON, J., following *Gibbon v. Michael's Bay Lumber Co.* (1885), 7 O.R. 746, affirmed.

Per CLUTE, J.:—Where a contract is open to two constructions, one of which contravenes a public statute and the other does not, it should be assumed that the parties did not intend to commit a breach of the law. The provisions of the agreement shewed that whatever days or parts of days were to be paid for were those days on which work could be done.

ACTION for money alleged to be due under an agreement for the rent of an excavating plant.

June 22 and 23. The action was tried by MIDDLETON, J., without a jury, at Toronto.

R. H. Greer, for the plaintiff.

W. Laidlaw, K.C., and *W. I. Dick*, for the defendants.

June 24. MIDDLETON, J.:—The action is brought upon a written contract by which the plaintiff rented to the defendants a certain plant owned by him, for the purpose of excavating a siding and a site for a building upon the defendants' land. The plant consisted of a locomotive, shovel, and some cars; and the rental stipulated was \$62 per day, "to start immediately on outfit leaving main line and to run each and every day."

The contention put forward by the defendants is that this means excluding Sundays, and they contend that, if this is not the meaning of the contract, the contract ought to be reformed.

I am against the defendants on both contentions. The contract was deliberately and carefully prepared, and embodies the

agreement arrived at. The intention was that Sunday should be paid for, and that is, I think, the true construction of the agreement.

Gibbon v. Michael's Bay Lumber Co. (1885), 7 O.R. 746, is, I think, conclusive. The argument that this would involve work upon Sunday is met by what is said by Wilson, C.J., at p. 751: "When Sunday is not computed . . . it is not because in England or in this country work is prohibited to be done on that day, but because by the contract it has been expressly excluded from the computation named, or by the time being restricted to working days." It may be, as in the case referred to, computed as a day to be paid for, although the law will not suffer any work to be done upon that day.

The point that most strongly impressed me against this view was the fact that the \$62 includes a sum to be paid for wages; but the parties have carefully stipulated that \$62 is to be paid by way of rental, although certain men were to be supplied free by the lessor.

I do not think it necessary to deal with the other matters in detail. I accept the evidence of the plaintiff that it cost less to move the machine from the end of the siding than to move it from the place where the defendants contend it should have been brought upon their land, and no time was consumed in moving the cars and plant over the adjacent siding.

I do not think the credit given for the delay owing to the absence of the full quota of men contracted for, between the 9th and 14th October, is sufficient, and I have increased this sum to the \$60 suggested by Mr. Laidlaw.

After making all adjustments, I think that there should be judgment for the plaintiff for \$724, with costs.

The defendants appealed from the judgment of MIDDLETON, J.

September 30 and October 1. The appeal was heard by MULOCK, C.J.Ex., CLUTE, RIDDELL, and SUTHERLAND, JJ.

W. Laidlaw, K.C., and W. I. Dick, for the appellants. The plaintiffs rented the plant to the defendants at a rental of \$62

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per day, "to start immediately on outfit leaving main line and to run each and every day." This means excluding Sundays, for otherwise the contract would involve work on Sundays, in contravention of both the common law and the Lord's Day Act, and would be illegal. This the parties did not intend. See Holmsted's Sunday Law in Canada, p. 47. The Christian religion is part of the common law of England: Potter's Dwarries on Statutes and Constitutions, p. 465; Smith's Leading Cases, 11th ed., vol. 1, p. 369. The imposition of a penalty for the contravention of a statute avoids a contract entered into against the provisions of the statute: *North Western Salt Co. Limited v. Electrolytic Alkali Co. Limited*, [1914] A.C. 461, at p. 469.

G. L. Smith, for the plaintiff, respondent. The learned trial Judge's judgment is right, for the reasons given. Under the terms of the contract the defendants were to pay a rental of \$62 for "each and every day," and this means consecutive days, including Sundays: Halsbury's Laws of England, vol. 26, para. 205. There was nothing illegal in such a contract. No duty was cast upon the defendants to work the plant on Sunday, but nevertheless they had to pay rent for that day: *Brown v. Johnson* (1842), 10 M. & W. 331. The evidence shews that payment for Sundays was contemplated by the parties. There were certain necessary works which had to be done about the plant on Sundays, and for such necessary works the Lord's Day Act provides. See R.S.C. 1906, ch. 153, sec. 12 (d) and (e). If Sundays were not to be included, the contract should have so provided: *Gibbon v. Michael's Bay Lumber Co.*, 7 O.R. 746; *Cornfoot v. Royal Exchange Assurance Corporation*, [1904] 1 K.B. 40; *London County Council v. South Metropolitan Gas Co.*, [1904] 1 Ch. 76. The term in the contract "one day to constitute ten hours" is only a basis on which to calculate what shall be overtime.

Laidlaw, in reply, referred to Halsbury's Laws of England, vol. 7, para. 807 *et seq.*

MULOCK, C.J.Ex. (at the close of the argument):—The opinion of the majority of the Court is, that the meaning of the contract is that the defendants were to pay a minimum of \$62

for every day that elapsed between the time when the plant left the main line and the time of the completion of the work. The contract does not say that the payment is to be made only while the plant is at work, but, on the contrary, that payment shall be made with regard to the time during which the plant is at the disposal of the defendants; such appears to be the meaning of the contract.

The words in the contract, "Rental to start immediately on outfit leaving main line and to run each and every day until the work is complete," include every calendar day between the commencement and the end. There is nothing illegal in saying, I leave a chattel in your possession to-day, and you are to pay me a certain sum per day for every day until you return it.

The case has been argued by the appellant as if no rent were payable except for the days when the plant was operated. The provision in the contract "one day to constitute ten hours" is for the purpose of determining the question what should be paid in the event of the plant being worked longer than ten hours. The defendants might or might not work it during ten hours; but, if they worked it longer, the defendants should pay a half rate higher, and if on Sunday, double rate. But there is no duty cast on them to work it.

We think the learned trial Judge is right in including Sunday. The language of the contract is for every day. If Sundays were not to be included, the contract should have so provided.

The majority of the Court are of the opinion that the appeal should be dismissed with costs.

RIDDELL, J.:—Practically the objection urged by the appellants reduces down to the proposition that the judgment appealed from necessitates reading into the contract some kind of obligation, or at least understanding, to violate the law by doing work on Sunday. I can find nothing of the kind in the contract. The plant, etc., is put at the disposal of the defendants to use or not as they see fit; the rental, no doubt, fixed with payment for every day, lay or otherwise, having in view a reason-

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able return to the plaintiff for his investment on that basis. The defendants are not called upon to work at any particular time; what they are obliged to do is to pay "rental . . . immediately on outfit leaving main line . . . each and every day until work is complete."

They must govern themselves according to the law; the work they may do on Sunday must be such that it does not violate the law; but there is nothing in the contract which obliges them to violate the law nor is there any implication that they will do so.

I agree that the appeal should be dismissed with costs.

SUTHERLAND, J., also agreed.

CLUTE, J.:—With great respect, I have the misfortune to dissent from the view taken by the majority of this Court.

Where a contract is open to two constructions, one of which contravenes a public statute and the other does not, it should, I think, be assumed that the parties did not intend to commit a breach of the law. In the present case I do not think it would be legal to contract in so many words to do work on a Sunday; and, as I read the contract, there was no intention to do so unless certain work became necessary. It is a contract to pay \$62 per day for the use of the plant; ten hours to constitute a day; all work outside of these hours to be charged extra as overtime, on week days as time and a half and on Sundays as double time. This, I think, clearly shews that whatever days or parts of days were to be paid for were those days on which work could be done. It is true that the word "rental" is used, but the other parts of the contract shew its meaning. The rental was to start immediately on the outfit leaving the main line "and run each and every day until work is complete;" a minimum rental charge of not less than twenty days is to be made if the plant is released before the expiration of that time. In addition to the plant, the plaintiff has agreed to supply the labour necessary to run it, namely the cranesmen, firemen, engineer, watchman, and six pitmen, other labour to handle the work to be supplied by the defendants.

My view is, that the contract did not purport or intend that there should be any breach of the law in regard to work on Sundays. There was certain work that would have to be done, it is said, such as keeping up the fires and cleaning the engine. Liability for this work was not disputed by the defendants. During the course of the work there was no suggestion by any one that the ordinary excavation work should be carried on on Sunday. Had there been a clause in the contract requiring that work should be proceeded with on Sunday, it would, in my opinion, have been illegal, but it is not necessary so to read the contract. It was a hiring by the day, and the number of hours to be worked on each day was named. There is no indication that there was any intention to pay for any day which was not named. All claims for the plant, including necessary Sunday work, have been paid for; no other work was done on Sunday.

As to the counterclaim, the evidence was conflicting, and I do not think the findings of the trial Judge should be disturbed.

I would allow the appeal with costs and dismiss the counterclaim with costs.

Appeal dismissed; CLUTE, J., dissenting.

[APPELLATE DIVISION.]

SEILER v. FUNK.

Gifts—Intended Marriage—Breach of Condition—Termination of Engagement—Recovery of Gifts Made in Contemplation of Marriage.

The defendant promised to marry the plaintiff upon condition of his absolutely refraining thereafter from taking any intoxicating liquor:—

Held, upon the evidence, that the plaintiff had broken his promise, and that the engagement came to an end by reason of the breach of the condition on which it was entered into.

Held, also, that the plaintiff was not entitled to recover any personal presents which, during the engagement, he made to the defendant in prospect of marriage; *aliter*, as to articles purchased with the plaintiff's money with a view to furnishing a house upon marriage, and articles and money lent to the defendant.

Robinson v. Cumming (1742), 2 Atk. 409, and *Ryan v. Whelan* (1901), 21 C.L.T. Occ. N. 406, considered.

Judgment of the County Court of the County of Waterloo varied.

ACTION in the County Court of the County of Waterloo by Leslie Seiler, plaintiff, against Idessa Funk, defendant, to re-

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cover certain articles presented to the defendant by the plaintiff after an engagement to marry had been made between them and in contemplation of such marriage and money lent to the defendant during the engagement, which was put an end to by the defendant.

The articles claimed by the plaintiff were, the engagement ring, a \$5 gold piece, a watch, a watch-fob, silver candelabra, and certain glass-ware.

The action was tried by the Junior County Court Judge without a jury, and judgment was given in the plaintiff's favour. The reasons for judgment were as follows:—

There is no doubt that gifts of any kind may be made subject to conditions either precedent or subsequent, and that the conditions may be either express or implied.

I take it that when a man, after engagement for marriage with a woman, presents her with a ring, commonly called an engagement ring, and other articles of personal or household usefulness, he does so in contemplation of marriage between them—and there is an implied condition attached to such gifts that the woman will marry the man.

I do not think under English law that the breaking of the engagement by one of the parties for good cause disentitles the other to a return of such articles, although there is some show of American authority for that view—and so it is unnecessary for me to find whether or not good cause for the breach was shewn.

In my view of the case then, the plaintiff is entitled to a return of the articles claimed, and to the sum of \$25 remaining in hand after payment out of the \$50 for the candelabra, and in the event of all the articles in question not being forthcoming the plaintiff will be entitled to recover the amount of their value; such value in all cases not being given, a reference may be had to determine the same if the parties cannot agree.

Although some of the articles in question were tendered back, all of them were not, and so the plaintiff is entitled to his costs.

The judgment, as drawn up, provided for the recovery by the plaintiff of the articles claimed by him, including silver

candelabra purchased by the defendant out of moneys lent, also the sum of \$25 moneys in hand, and for a reference to determine the value of such of the articles as might not be forthcoming.

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The defendant appealed from the judgment of the County Court, upon the following grounds:—

1. That the learned Judge at the trial erroneously held that the presents in question, given to the defendant by the plaintiff, were given to her conditionally, and that she was bound to return them on the breaking of their engagement.

2. That the learned Judge erred in finding that the misconduct and dissolute habits of the plaintiff, although giving good and sufficient cause to the defendant for breaking the engagement, did not affect the plaintiff's right (if such right existed) to have the said presents returned.

3. That the learned Judge erred in finding that the plaintiff was entitled to a return of \$25 cash alleged to be in the hands of the defendant and belonging to the plaintiff, as no moneys were either claimed by the plaintiff from the defendant or proven to be due by the defendant to the plaintiff.

4. That the judgment was contrary to the law and the evidence and the weight of the evidence.

November 12. The appeal was heard by MEREDITH, C.J.O., MACLAREN and HODGINS, JJ.A., and CLUTE, J.

J. A. Scellen, for the defendant, argued that the plaintiff had broken the condition of the engagement, namely, that he would refrain from the use of intoxicating liquor, and had thus relieved the defendant from carrying out the contract of marriage, and so had lost all right to the gifts demanded by him in replevin. He referred to *Williamson v. Johnson* (1890), 62 Vt. 378; *Berry v. Berry* (1871), 31 Ia. 415. A party to a contract is not entitled to recover back money paid by him for a consideration that has failed, where the failure has been caused by the party's own default: *Maritime Gypsum Co. Limited v. Redden* (1912), 11 E.L.R. 586. Gross manners on the part of a man or a man's bad character may be set up as a defence by a woman when sued: *Chitty on Contracts*, 16th ed., p. 590.

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A. B. McBride, for the plaintiff, contended that the defendant had broken the engagement; consequently the default was hers. The articles sued for had been given her on condition of marriage. Gifts may be made subject to a condition subsequent: Halsbury's Laws of England, vol. 15, p. 421, para. 835. The consideration had failed through the defendant's default, and so the plaintiff was entitled to have the articles restored to him: *Ryan v. Whelan* (1901), 21 C.L.T. Occ. N. 406; *Robinson v. Cumming* (1742), 2 Atk. 409. In the circumstances of this case, the authorities cited on behalf of the defendant did not apply.

Scellen, in reply.

At the close of the argument the judgment of the Court was delivered by MEREDITH, C.J.O.:—We think that the respondent is not entitled to recover back any personal presents that were made to the appellant.

It is admitted by the respondent that before his engagement he had been drinking, and, according to the testimony of the appellant, her promise to marry the respondent was conditional upon his absolutely refraining thereafter from taking any intoxicating liquor. That is undisputed.

There is a conflict of testimony as to whether during the engagement the respondent broke that promise, but the evidence, we think, supports the contention of the appellant that he did. She says that she smelt liquor upon him on two occasions; and the evidence of the police constable is corroborative of her testimony. If the promise was broken, the appellant rightly broke off the engagement—or perhaps it would be more correct to say that the engagement fell through by reason of the breach of the condition on which it was entered into—it was a conditional promise of marriage, and the condition being broken the promise was dissolved.

There is very little authority upon the question of the right to get back presents made in prospect of marriage.

In the case of *Robinson v. Cumming*, 2 Atk. 409, the Lord Chancellor expresses the opinion that “if a person has made his addresses to a lady for some time, upon a view of marriage, and, upon reasonable expectation of success, makes presents to a con-

siderable value, and she thinks proper to deceive him afterwards, it is very right that the presents themselves should be returned, or the value of them allowed to him”

The use of the word “deceive” indicates that what is said was intended to apply to cases in which the engagement is broken without cause.

In the case cited by Mr. McBride, *Ryan v. Whelan*, 21 C.L.T. Occ. N. 406, the Chancellor refers to what Fonblanque says in his “Treatise on Equity,” vol. 1, p. 439: “A present made in prospect of marriage may be revoked, and demanded back, if the marriage does not take effect, especially if it sticks on that side to whom the present was made.”

In support of the proposition that it may be demanded back, Fonblanque refers to *Beaumont v. ———* (1677), 2 Mod. 140, 141. He also refers to Viner’s Abridgement, “Gift,” 19, pl. 7.

We think that the respondent is not entitled to recover any personal presents which he made to the appellant. The candelabra stand upon a different footing. It is admitted that, although originally not given for that purpose, it was agreed that \$25 of the \$55 which the respondent gave to the appellant should be expended on the purchase of candelabra for the house, and the candelabra were purchased on that understanding; and we think that the respondent is entitled to recover them.

He is not entitled to recover the cut glass. The appellant testified, and there is no denial of what she said, that it was bought with money given to her as a Christmas present. The respondent admits this, but says that it was afterwards agreed that the money should be expended in the purchase of cut glass for the house. The present, being a Christmas present, does not fall within the principle of the *Robinson* case, and the appellant is not entitled to recover the cut glass.

The appellant is not entitled to the candelabra, the gold watch and fob, or the \$5 gold piece; and the respondent is entitled to recover them.

The appellant succeeds as to the remainder of the articles claimed by the respondent.

There will be no costs of the action or the appeal to either party.

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[APPELLATE DIVISION.]

Nov. 13.

GREER v. CANADIAN PACIFIC R.W. Co.

Railway—Burning Worn-out Ties on Right of Way—Damage by Spread of Fire—Negligence—Common Law Liability—Statutory Time-limit on Action—“Injury Sustained by Reason of the Construction or Operation of the Railway”—Railway Act, R.S.C. 1906, ch. 37, sec. 306—Duty Imposed by sec. 297.

Held (affirming the judgment of MIDDLETON, J., 31 O.L.R. 419), that the injury done to the plaintiff by the defendant company setting out fire on its right of way for the purpose of destroying worn-out ties, and failing to prevent its spread to his land, was an injury caused by the “operation of the railway,” and the time-limit for bringing an action therefor, imposed by sec. 306 of the Railway Act, R.S.C. 1906, ch. 37, was applicable.

The phrase “operation of the railway” in that section is not used in the narrow sense of running trains; the section applies where the damage or injury “arises from the execution or neglect in the execution of the powers given to or assumed by the company for enabling them to construct or maintain their railway” (*per* OSLER, J.A., in *Ryckman v. Hamilton Grimsby and Beamsville Electric R.W. Co.* (1905), 10 O.L.R. 419, at p. 427).

By sec. 297 of the Railway Act, the duty is imposed upon a railway company of at all times maintaining and keeping its right of way free from dead grass, weeds, and other unnecessary combustible matter, and it was in performing that duty that the injury to the plaintiff was done. If the mode in which the work was done was negligent or unlawful, the railway company was answerable for the damage which the plaintiff suffered; but the act was none the less an act done in the course of, and the injury to the plaintiff was none the less an injury sustained by, the “operation of the railway.”

Prendergast v. Grand Trunk R.W. Co. (1866), 25 U.C.R. 193, *Ryckman v. Hamilton Grimsby and Beamsville Electric R.W. Co.*, 10 O.L.R. 419, *Grant v. Canadian Pacific R.W. Co.* (1904), 36 N.B.R. 528, and *Canadian Northern R.W. Co. v. Robinson* (1910), 43 S.C.R. 387, [1911] A.C. 739, distinguished.

McCallum v. Grand Trunk R.W. Co. (1870-1), 30 U.C.R. 122, 31 U.C.R. 527, followed.

APPEAL by the plaintiff from the judgment of MIDDLETON, J., 31 O.L.R. 419.

September 21. The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, J.J.A.

W. Laidlaw, K.C., for the appellant, relied on *Prendergast v. Grand Trunk R.W. Co.* (1866), 25 U.C.R. 193. The plaintiff's case does not require the support of a statute, as his right arises at common law, as an adjoining proprietor. He referred to *Grant v. Canadian Pacific R.W. Co.* (1904), 36 N.B.R. 528;

Halsbury's Laws of England, vol. 21, para. 675; Clerk and Lindsell's Law of Torts, 6th ed., p. 470; *McCallum v. Grand Trunk R.W. Co.* (1870-1), 30 U.C.R. 122, 123, 31 U.C.R. 527; *Ryckman v. Hamilton Grimsby and Beamsville Electric R.W. Co.* (1905), 10 O.L.R. 419, *per* Osler, J.A., at p. 432; *Jones v. Festiniog R.W. Co.* (1868), L.R. 3 Q.B. 733; *Smith v. Denver and Rio Grande R.R. Co.* (1913), 54 Col. 288; *Canadian Northern R.W. Co. v. Robinson* (1910), 43 S.C.R. 387, [1911] A.C. 739.

Shirley Denison, K.C., for the defendant company, respondent, argued that the sole point in the case was whether or not the act complained of was done in the "operation" of the railway. [MACLAREN, J.A., thought that there might be an obligation, even if the fire were set out by a stranger.] That would be extending the doctrine of *Rylands v. Fletcher* (1868), L.R. 3 H.L. 330, too far. Even though the operation were carried on unlawfully, it would be "operation." He referred to *West v. Corbett* (1913), 47 S.C.R. 596. The protection given by the statute should not be frittered away.

Laidlaw, in reply.

November 13. The judgment of the Court was delivered by MEREDITH, C.J.O.:—This is an appeal by the plaintiff from the judgment of Middleton, J., dated the 5th June, 1914, pronounced after the trial of the action before him, sitting without a jury, at Bracebridge, on the 19th May, 1914.

The action is brought to recover damages for the loss sustained by the appellant owing to two fires which were set out by the respondent on its line of railway having spread to the adjoining land of the appellant. The fires were set out for the purpose of burning old ties, which had been removed from the track and replaced by new ones, and it spread to the lands of the appellant, owing, as was admitted, to the negligence of the respondent.

The learned trial Judge found in favour of the appellant upon the issue as to the liability of the respondent, but gave effect as to one of the fires to the defence set up that the cause of action in respect of it was barred by sec. 306 of the Railway Act, R.S.C. 1906, ch. 37.

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It was contended by counsel for the appellant that the liability of the respondent was a liability at common law, and that sec. 306 has, therefore, no application; and in support of that contention, among other cases, *Prendergast v. Grand Trunk R.W. Co.*, 25 U.C.R. 193, was cited; but that case is, in my opinion, clearly distinguishable. As I understand the reasons for judgment, the ground of the decision was, that it was not alleged or proved that the fire which caused the damage was set out in the course of the operation of the railway, and that for all that appeared it may have been set out for a purpose altogether unconnected with its operation, and that the limitation section had, therefore, no application.

In the subsequent case of *McCallum v. Grand Trunk R.W. Co.*, 30 U.C.R. 122, 31 U.C.R. 527, the declaration alleged in substance that a large quantity of trees, cordwood and timber, growing and being on the land of the plaintiff, were burnt by a fire which was caused by dry wood, leaves, etc., which had been negligently allowed to accumulate beside the railway track on the defendant's land, being ignited by the red hot ashes and other igneous matter which fell out of an engine being propelled along the track, and which spread to the plaintiff's land owing to the negligence of the defendant in not taking due precaution to prevent the fire from so spreading. In the Court below it was held that the injury of which the plaintiff complained was an injury sustained by reason of the railway, and that the cause of action was, therefore, barred by the limitation section of the Railway Act then in force. This decision was affirmed by the Court of Error and Appeal, and it was pointed out by the Chief Justice (p. 531) that *Prendergast v. Grand Trunk R.W. Co.* was distinguishable on satisfactory grounds, which are thus stated: "The action was for negligently permitting a fire to remain in and upon the track of the railway, and near the close of the plaintiff, at a time when by reason of the state of the wind and weather it was improper so to do; so that through negligence and want of proper caution the fire extended out of the railway upon the plaintiff's close, and burnt fences, trees, etc. And the Court held that the injury was one at common law, by one proprietor of land against an adjoining proprietor, for negligently managing

a fire supposed to be caused on the land of the latter without his neglect or default, and therefore this section of the Railway Act did not apply." And at pp. 531, 532, again distinguishing *Prendergast v. Grand Trunk R.W. Co.*, the Chief Justice said: "There was nothing in the cause of the fire, or in the negligence which allowed it to spread, to distinguish it from any fire which had been kindled on one man's lands and was negligently suffered by him to extend to the premises of his neighbour. The jury acquitted the defendants of negligence, which according to the report was not even charged in the declaration, for that only alleged that the defendants wrongfully permitted a fire to remain on the track of the railway near the close of the plaintiff in a careless, negligent, and improper manner, when by reason of the state of the wind and weather it was dangerous so to do. Nothing of which the plaintiff complained and for which he got his verdict was therefore by reason of the railway, unless in the remote connection that the defendants being a railway company were possessed of the land upon which the railway was constructed. In the case now in judgment, so far as appears, the fire originated from the engine of the defendants (which the first count states) and it was in the lawful and necessary use of fire in order to carry on the ordinary business of the defendants, and *without any negligence on their part*, which fire spread and did the mischief complained of. The *causa causans* was therefore a part of the working of the railway, and the effect was 'by reason of the railway;' and we are not deciding whether the defendants were guilty of negligence in letting the fire extend in manner and form as the second count charges, but whether, admitting that the second count is proved, it is a count claiming indemnity for a damage or injury by reason of the railway."

Ryckman v. Hamilton Grimsby and Beamsville Electric R.W. Co., 10 O.L.R. 419, was also much relied on by counsel for the appellant. It is, no doubt, well settled that the limitation section does not apply to a cause of action for a breach of the duty of a railway company as a common carrier; and all that was decided in that case was that the action was for breach of the duty of the defendant as a common carrier to carry safely; and that the limitation section did not, therefore, apply.

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As was said by Richards, J., in *Auger v. Ontario Simcoe and Huron Railroad* (1859), 9 U.C.C.P. 164, 169: "There is no doubt the Courts have held repeatedly that the limitation clauses do not apply where the companies are carrying on the business of common carriers . . . but the liability arises in those cases from the breach of contract, arising from their implied undertaking to carry safely. . . ."

And in *Carpue v. London and Brighton R.W. Co.* (1844), 5 Q.B. 747, 757, in which the action was for breach of the defendants' duty to carry safely, Denman, C.J., said: "The injury has arisen from the defendants' misconduct as carriers, and not as proprietors."

In *Grant v. Canadian Pacific R.W. Co.*, 36 N.B.R. 528, no question as to the limitation section arose. In that case the fire had been set, as in this, on the defendant's right of way, for the purpose of burning old ties as well as other rubbish, and all that was decided was that there was sufficient evidence to justify the verdict for the plaintiff. Two of the Judges expressed the opinion that certain Provincial Acts to prevent the destruction of forests and other property were not *ultra vires*; and that, as the fires were set out in contravention of these statutes, the defendant was liable irrespective of any other negligence; and one of the Judges (McLeod) was of opinion that, as the defendants were not authorised by any law or statute to get rid of the ties and rubbish by burning them, and, not having shewn that "the escape of the fire was owing to the plaintiff's fault, or *vis major* or the act of God," they were "liable irrespective of negligence in allowing it to escape" (p. 543).

Smith v. Denver and Rio Grande R.R. Co., 54 Col. 288, does not help the appellant. The action in that case was brought to recover damages for property alleged to have been destroyed by fire negligently set out and caused by the defendant. There was in force a statute which provided that "every railroad company operating its line of road, or any part thereof, within this State shall be liable for all damages by fires that are set out or caused by operating any such line of road, or any part thereof, in this State, whether negligently or otherwise; and such damages may be recovered by the party damaged, by the proper

action, in any Court of competent jurisdiction: provided, the said action be brought by the parties injured within two years next ensuing after it accrues." What was decided was that this statute did not create or comprehend a liability founded on negligence; and that, as the plaintiff's action was based on negligence, the limitation provision did not apply. The case has, therefore, no application to the question under consideration.

In *Canadian Northern R.W. Co. v. Robinson*, 43 S.C.R. 387, [1911] A.C. 739, it was held that the limitation section did not apply to a cause of action for a breach of the railway company's statutory duty to provide facilities for the plaintiff by means of a siding outside the railway as constructed, it not being an act done in the operation of the railway. In delivering the judgment of the Judicial Committee, Lord Haldane said (p. 745): "In the opinion of their Lordships the special provisions" (*i.e.*, the limitation section) "do not apply. They are confined to damages or injury sustained by reason of the construction or operation of the railway. The words of exception in the subsection relate to carriage of traffic and to tolls, and do not require any construction which extends the meaning of the phrase 'operation of the railway.' Such operation seems to signify simply the process of working the railway as constructed. The refusal or discontinuance of facilities for making a siding outside the railway as constructed and connecting it with the line does not appear to be an act done in the course of operating the railway itself."

None of the cases relied on by counsel for the appellant appears to me to support his contention.

In my opinion, the injury done to the appellant by setting out the fire and failing to prevent its spread to his lands was as much an injury caused by the operation of the railway as the injury caused by the negligent omission of the defendants in the *McCallum* case to remove the inflammable material on the line, which was ignited by the hot ashes that fell from the locomotive, and to prevent the spreading of the fire to the plaintiff's lands, was an injury by reason of the railway.

By sec. 297 of the Railway Act, the duty is imposed upon rail-

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way companies of at all times maintaining and keeping their right of way free from dead grass, weeds, and other unnecessary combustible matter, and it was in performing that duty that the injury to the appellant was done. That the mode in which the work was done was a negligent one, or even, having regard to the statute, unlawful, is beside the question. If it was negligent, as it has been found to have been, or unlawful, the respondent was answerable for the damage which the appellant suffered; but the act was, in my opinion, none the less an act done in the course of the "operation of the railway," and the injury to the appellant none the less an injury sustained by the "operation of the railway."

The performance of the duty imposed by sec. 297 is recognised by the Act itself as part of the operation of the railway; as the group of sections of which that section is one is headed "Operation." This indicates, I think, that the phrase "operation of the railway" was not used in the narrow sense of running trains, but was intended to include such acts as that in which the respondent was engaged in the doing of which the injury of which the appellant complains was occasioned; and I am of opinion that the section applies where the damage or injury "arises from the execution or neglect in the execution of the powers given to or assumed by the company for enabling them to construct or maintain their railway:" *per* Osler, J.A., in *Ryckman v. Hamilton Grimsby and Beamsville Electric R.W. Co.*, 10 O.L.R. at p. 427.

Appeal dismissed with costs.

[APPELLATE DIVISION.]

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CHADWICK V. CITY OF TORONTO.

April 4.
Nov. 13.

Nuisance—Noise and Vibration from Operation of Pumps by Electric Power—Injury to Enjoyment of Neighbouring Property—Possibility of Operation by Steam Power—Statutory Authority—Injunction—Damages—Limitation.

The defendant corporation was empowered by statutes (35 Vict. ch. 79 and 41 Vict. ch. 41) to operate a pumping plant and machinery for the purpose of its waterworks. The machinery was at first operated by means of steam power, but afterwards electrical power was substituted:—

Held, upon the evidence, that the noise and vibration occasioned in the operation of the pumps by electrical power constituted a nuisance, and seriously interfered with the comfort of the plaintiffs in the enjoyment of their house situate close to the pumping station.

And *held*, that, as it was not shewn that the machinery could not be operated unless driven by electrical power, and as the use of electrically-driven machinery was not expressly authorised by the statutes, the nuisance was not justified by statutory authority.

Semble, that, if it had been shewn that the machinery could not be operated unless driven by electrical power, that mode of operation would be regarded as authorised by the statutes; and *quære*, whether the same result would not follow if it were commercially impracticable to use any other power.

Jones v. Festiniog R.W. Co. (1868), L.R. 3 Q.B. 733, and *West v. Bristol Tramways Co.*, [1908] 2 K.B. 14, applied.

Held, also, a proper case for awarding damages in lieu of an injunction; but the damages should be limited to the injury suffered by the use of electrically-driven machinery beyond that which would have been sustained if steam power had been used.

Judgment of MIDDLETON, J., varied.

ACTION by Vaux Chadwick and Jessie Dorothea Chadwick, his wife, for an injunction restraining the defendant corporation from operating electric pumps at its pumping station in the city of Toronto in such a manner as to interfere with the reasonable use and enjoyment of the plaintiffs' dwelling-house, situated close to the station, and for \$5,000 damages, and further relief, if necessary.

March 20 and 21. The action was tried by MIDDLETON, J., without a jury, at Toronto.

H. E. Rose, K.C., for the plaintiffs.

G. R. Geary, K.C., and *Irving S. Fairty*, for the defendant corporation.

April 4. MIDDLETON, J.:—The plaintiffs claim an injunction restraining the operation of certain electric pumps at the high

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level pumping station on Poplar Plains Road, Toronto. The defendant corporation has for many years owned and operated a high level pumping station at the place in question. Originally there were only two comparatively small pumps, capable of delivering three and one-half million gallons each *per diem*. These were reciprocating pumps, driven by reciprocating engines, and the noise produced was not sufficient to interfere seriously with the comfort of persons living in the neighbourhood.

Two much larger reciprocating steam pumps were added to the plant in 1906. These were capable of pumping 6,000,000 gallons each. Although these made a good deal more noise, their operation is not sufficient to constitute a nuisance calling for legal interference.

Early in 1912, eight electrically-driven pumps were installed, capable of delivering a very much larger quantity of water. These are not all operated at once, but from the moment of their installation they have been found to interfere seriously with the plaintiffs' comfort. Instead of the comparatively slow motion of the old pumps, these operate at a speed of between 721 and 750 revolutions per minute; the result being a vibration which is felt, as well as a humming or buzzing noise which is heard.

The different pumps are not run at precisely the same speed, so that the noise produced is a discord, resulting in pulsations or waves of greater or less intensity, which is stated to be peculiarly trying. Numerous witnesses were called for the plaintiffs, who describe this noise and its effect in different ways. The plaintiff Jessie Dorothea Chadwick's own experience is detailed in a diary which was kept for the purpose of recording her impressions, with a view to this litigation.

Although there is some conflict upon the evidence, I have no doubt that the noise and vibration occasioned in the operation of these electric pumps do constitute a nuisance, and seriously interfere with the comfort of the plaintiffs and their family in the enjoyment of the house. It is true that in one sense the plaintiffs may be said to have come to the nuisance; but the state of affairs which now exists could not reasonably have been anticipated from the condition of things when the land was bought and the house erected.

I need not repeat what was said in *Appleby v. Erie Tobacco Co.* (1910), 22 O.L.R. 533, as to what is necessary to constitute an actionable nuisance. What is complained of here is not, I think, fanciful, and does not arise from mere delicacy or fastidiousness, but is an inconvenience materially interfering with the ordinary physical comfort of human existence, and therefore materially depreciating the value of the plaintiffs' house as a place of residence.

The defendant corporation seeks to justify the erection of the plant and its operation, under the Acts authorising the Establishment of Waterworks in the City of Toronto. These statutes, 35 Vict. ch. 79, 41 Vict. ch. 41, while authorising the construction of the waterworks, do not justify the commission of a nuisance. The case in this respect does not differ widely from the action of *Guelph Worsted Spinning Co. v. City of Guelph* (1914), 30 O.L.R. 466, in which I had recently occasion to review most of the authorities, and I need not here repeat what I there said. I may add to the cases therein referred to references to *Price's Patent Candle Co. v. London County Council*, [1908] 2 Ch. 526, and *Knight v. Isle of Wight Electric Light and Power Co.* (1904), 73 L.J. Ch. 299.

The Quebec decision, *Adami v. City of Montreal* (1904), Q.R. 25 S.C. 1, is in entire accord with this view.

There is no doubt that the city corporation has acted in the best of good faith, endeavouring to minimise the amount of noise and vibration resulting from the operation of these pumps; and there is also no doubt that the condition of affairs as it exists to-day is nothing like as serious as before the change made in the pumps by which a new and different diffusion ring was substituted. Even after all that is possible has been done, a nuisance still exists, and I think it may be taken for granted that it is impossible to do anything further, and that the nuisance will be more likely to increase than to abate when a greater number of pumps come to be operated at the same time.

Inasmuch as the pumping of this water is necessary for municipal purposes, the case, I think, falls under the provision of the Judicature Act empowering me to refrain from granting an injunction and to substitute damages.

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For the reasons indicated in the case of *Ramsay v. Barnes* (1913), 5 O.W.N. 322, these damages should be upon a basis of compensation for the injurious effect resulting in the depreciation of the plaintiffs' land, and, as a term of granting the defendant corporation relief from an injunction, I think it should assent to damages being assessed upon this basis. The evidence indicates that the works established are a permanency, and in the assessment of damages it would be unfair to allow the damages to be dealt with on any other basis.

From the attitude of the plaintiffs at the trial, I take it that they do not insist on damages for inconvenience suffered in the past, and that they are content with the damages now awarded. It was agreed that if damages were given there should be a reference to assess. This may be to the Master in Ordinary, unless the parties can agree upon some other referee or desire to give evidence before me at some date which may be arranged, so that I may myself assess them.

The defendant corporation appealed from the judgment of MIDDLETON, J.

June 11 and 12. The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A.

G. R. Geary, K.C., and *Fairty*, for the appellant corporation. The duty to erect the works was created by 35 Vict. ch. 79, sec. 3, and 41 Vict. ch. 41. The appellant's powers and duties in connection with municipal utilities are defined by the Municipal Act, 3 Edw. VII. ch. 19, sec. 566, sub-sec. 4(d); and see *Attorney-General of Canada v. City of Toronto* (1892), 23 S.C.R. 514. [MEREDITH, C.J.O., referred to *Shelfer v. City of London Electric Lighting Co.*, [1895] 1 Ch. 287.] Where there is only one possible site, as in this case, there cannot be an injunction: see *London Brighton and South Coast R.W. Co. v. Truman* (1885), 11 App. Cas. 45, at pp. 55, 56; *Bennett v. Grand Trunk R.W. Co.* (1901), 2 O.L.R. 425; *Geddis v. Proprietors of Bann Reservoir* (1878), 3 App. Cas. 430; *East Freemantle Corporation v. Annois*, [1902] A.C. 213, at p. 217; *Canadian Pacific R.W. Co. v. Roy*, [1902] A.C. 220; *Eastern and South African Telegraph Co. v.*

Cape Town Tramways Companies, [1902] A.C. 381. If another site could have been chosen, *Metropolitan Asylum District Managers v. Hill* (1881), 6 App. Cas. 193, would apply. The statute 35 Vict. ch. 79, and especially sec. 5, applies now, as the city grows: see *Hammersmith, etc., R.W. Co. v. Brand* (1869), L.R. 4 H.L. 171, at pp. 195, 202.

H. E. Rose, K.C., for the plaintiffs, respondents, argued that the appellant corporation had not proved that it had done all that was possible to abate the nuisance, and that the onus was on it to do so. On the question of legislative authority permitting a nuisance, see *Hopkin v. Hamilton Electric Light and Cataract Power Co.* (1901-2), 2 O.L.R. 240, at p. 244, 4 O.L.R. 258, and cases cited there; Halsbury's Laws of England, vol. 21, pp. 466, 467; vol. 23, pp. 312 *et seq.*; *Guelph Worsted Spinning Co. v. City of Guelph*, 30 O.L.R. 466; *Leyman v. Hessle Urban District Council* (1902), 19 Times L.R. 73; *Parish v. Mayor, etc., of City of London* (1901), 18 Times L.R. 63; *Metropolitan Asylum District Managers v. Hill*, *supra*; *Montreal Water and Power Co. v. Davie* (1904), 35 S.C.R. 255; *Adami v. City of Montreal*, Q.R. 25 S.C. 1; *West v. Bristol Tramways Co.*, [1908] 2 K.B. 14; *Price's Patent Candle Co. v. London County Council*, [1908] 2 Ch. 526.

Fairty, in reply, distinguished the *Adami* and *West* cases, and argued that the statutes impose upon the corporation a duty to decide the location of the works authorised by it.

November 13. The judgment of the Court was delivered by MEREDITH, C.J.O.:—This is an appeal by the defendant from the judgment dated the 4th April, 1914, which was directed to be entered by Middleton, J., after the trial of the action before him, sitting without a jury at Toronto, on the 20th and 21st days of the previous month.

In the reasons for judgment of the learned trial Judge the facts are fully set out; and it is, therefore, unnecessary to repeat them.

The use of electrically-driven machinery, the operation of which occasions the nuisance of which the respondents complain, is not expressly authorised by the legislation under the authority of which the appellant has constructed and is operating its

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waterworks system. The evidence established, no doubt, that for the supplying of water to consumers in the northern part of the city a high level pumping station is essential; and, if it had been shewn that the machinery for pumping could not be operated unless driven by electrical power, I should hold that the use of that mode of operating the machinery at the appellant's pumping station was authorised by the legislation to which I have referred, and that no action lay for such injury as that of which the respondents complain; and it may be, though it is unnecessary to express any opinion upon the point, that if, though not absolutely impracticable to use any other than electrically-driven machinery, it was commercially impracticable to do so, the same result would follow.

It is not open to question that it is practicable to operate the machinery by means of steam power, and that was the mode adopted and in use until electrical power was substituted for it.

The case seems, therefore, to fall within the principle of the decision in *Jones v. Festiniog R.W. Co.* (1868), L.R. 3 Q.B. 733, and not that of *Vaughan v. Taff Vale R.W. Co.* (1860), 5 H. & N. 679. The distinction between the two cases is clearly pointed out by Walton, J., in *West v. Bristol Tramways Co.*, [1908] 2 K.B. 14, 17, 18 (note), 24 Times L.R. 299, and his judgment was adopted by Farwell, L.J., in the Court of Appeal, [1908] 2 K.B. at p. 23.

It was argued by Mr. Geary that the finding of the trial Judge is, that the appellant has done all that is possible without being able to abate the nuisance, and that it is impossible to do anything further; but I do not so understand the finding, and I apprehend that the meaning of the learned Judge is, that it is impossible to do away with the nuisance if the pumps are to be operated by electrical power.

The scope of the reference is, I think, too wide. The compensation or damages which have been awarded should be limited to the injury suffered by the use of the electrically-driven machinery beyond that which would have been sustained if steam power had been used. The use of power for the purpose of pumping was essential to the exercise of the powers which the

Legislature has conferred upon the appellant; and if, as has been held, electrical power may not be used, the only alternative is to go back to the use of steam power; and for any inconvenience or injury which the respondents may sustain resulting from the use without negligence of that means of operating the machinery they have no right of action.

Subject to this variation, I would affirm the judgment and dismiss the appeal with costs.

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[APPELLATE DIVISION.]

JOSS v. FAIRGRIEVE.

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May 26.
June 26.
Nov. 13.

Practice—Ex Parte Order—Leave to Issue Execution—Extending Time for Moving against Order—Setting aside Order—Unsatisfied Judgment—Loss of Remedy—Limitation of Actions—Discretion—Appeal—Rules 176, 213, 216, 217—Personal Judgment against Married Woman—Nullity.

A judgment for the payment of money by the defendant was pronounced in favour of the plaintiff on the 19th April, 1894, but was not entered until the 15th April, 1914; on that day an order was made by the Master in Chambers, on the *ex parte* application of the plaintiff, allowing him to issue execution on the judgment; and execution was issued accordingly. There was no doubt that the judgment was unsatisfied. The defendant moved to set aside the order, but not within the time allowed by Rule 217. The Judge who heard the motion extended the time under Rule 176, and set aside the Master's order on the ground that it was improperly made *ex parte*:—

Held, notwithstanding that the judgment was unsatisfied, and that the right to enforce it might be lost by the plaintiff's slip, that the Judge's order was right, and could not be reversed on appeal—Rule 213 being explicit as to the necessity for notice of the application being given to the defendant, and the case not falling under Rule 216.

Held, also, that the appellate Court could not interfere with the discretion exercised by the Judge in extending the time for moving.

Semble, that the judgment entered against the defendant, who was a married woman, though a personal judgment, instead of a proprietary one, was not a nullity.

Order of FALCONBRIDGE, C.J.K.B., affirmed.

MOTION by the defendant to set aside or for leave to appeal from an order of the Master in Chambers of the 15th April, 1914, made upon the *ex parte* application of the plaintiff, allowing the plaintiff to issue execution upon a judgment pronounced on the 19th April, 1894, and to set aside the writ of execution issued

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by the plaintiff and an appointment for the examination of the defendant as a judgment debtor; and cross-motion by the plaintiff to commit the defendant for failure to appear for examination as a judgment debtor pursuant to subpoena and notice served.

May 21. The motions were heard by FALCONBRIDGE, C.J.K.B., in the Weekly Court at Toronto.

O. H. King, for the defendant.

M. Wilkins, for the plaintiff.

May 26. FALCONBRIDGE, C.J.K.B.:—The Master's order of the 15th April ought not to have been made *ex parte*. Rules 213 to 216 differ from the old Consolidated Rules.

The time allowed by Rule 217 for moving to rescind is extended under Rule 176. There will be an order setting aside the Master's order and the writ of execution issued pursuant thereto and the appointment for the examination of the defendant as a judgment debtor. The plaintiff's motion for committal of the defendant is dismissed—all with costs to be set off *pro tanto* against the plaintiff's judgment.

The plaintiff moved for leave to appeal to a Divisional Court of the Appellate Division from the order of FALCONBRIDGE, C.J.K.B., which was issued as a Chambers order.

June 23. The motion was heard by MIDDLETON, J., in Chambers.

The same counsel appeared.

June 26. MIDDLETON, J.:—I think the case is one in which leave should be granted; and that, inasmuch as notice has already been given upon the assumption that the order was a Court order, it should stand as an appeal from the order actually issued.

A judgment for the recovery of money was given by consent, now more than twenty years ago. The judgment was not actu-

ally issued until recently, probably because the defendant was supposed to be worthless financially. There is no suggestion that the judgment has been paid. The judgment was settled upon notice to the defendant before the Senior Registrar, just before the expiry of the twenty years. An order was then obtained *ex parte*, permitting the issue of execution. The execution was issued and placed in the Sheriff's hands. A motion was made by way of appeal from the order of the Master in Chambers, upon the ground, *inter alia*, that the order was improperly issued *ex parte*. Although properly a Chambers motion, this was made in Court and heard in Court. The motion was out of time, but the learned Chief Justice of the King's Bench relieved the defendant from her default, and set aside the order and the execution based upon it, upon the technical ground that the order was improperly made *ex parte*.

The twenty years had then expired. The plaintiff desired to appeal, and, assuming that the order was a Court order, appealed. The order has now been issued as though it were a Chambers order, and this motion is made upon the theory that the order was rightly so issued.

I give leave to appeal, and extend the time so far as may be necessary to validate the notice already given, because the questions involved are difficult, and it appears to me questionable whether indulgence should have been granted to the defendant to avail himself of what was after all a technical error of the plaintiff's solicitor, and so defeat payment of a claim which undoubtedly exists; and also because in effect, though not in form, the order in question finally disposes of a right or claim.

A factor influencing my decision is the fact that it seems unfair to allow the motion to have been made and heard in Court, where the right of appeal would be untrammelled, and then, after an appeal is taken, to defeat it by issuing the order as a Chambers order.

The costs will be costs in the cause upon the appeal.

October 1. The appeal was heard by MEREDITH, C.J.O., MAGEE and HODGINS, JJ.A., and BRITTON, J.

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M. Wilkins, for the plaintiff, the appellant, argued that under Rules 183 and 184 what was done was an irregularity merely, and not a nullity. Rule 185 also applies, as the delay was only one month. The order may be supported under Rule 216. The time for bringing action on the judgment has now expired.¹ The plaintiff is entitled to the benefit of Rule 217. See *Allison v. Breen* (1900), 19 P.R. 119. The time for moving against the Master's order should not have been extended.

A. C. McMaster and *O. H. King*, for the defendant, the respondent, contended that, although the defendant did not move within four days after the order of the Master in Chambers came to her notice, she had not lost her right. The order should not have been made without notice: *National Bank v. Cullen*, [1894] 2 I.R. 683. On the difference between an irregularity and a nullity, see *Hoffman v. Crerar* (1899-1900), 18 P.R. 473, 19 P.R. 15. A personal judgment against a married woman is a nullity, and cannot even be amended: *Oxley v. Link*, [1914] 2 K.B. 734. See the Married Women's Property Act, R.S.O. 1914, ch. 149, sec. 4, sub-sec. 2, and *Scott v. Morley* (1887), 20 Q.B.D. 120, as to a married woman's capability of entering into a contract, etc. The judgment is a nullity, and another judgment cannot be entered. owing to the time having run. This would not be the case if it were a mere irregularity. They also referred to *Smurthwaite v. Hannay*, [1894] A.C. 494, at p. 501, and *Hewitson v. Fabre* (1888), 21 Q.B.D. 6.

November 13. MEREDITH, C.J.O.:—This is an appeal by the plaintiff from an order of the Chief Justice of the King's Bench, dated the 26th May, 1914, extending the time for appealing from an order of the Master in Chambers dated the 15th April, 1914, and setting aside the order and the execution and the appointment for the examination of the respondent as a judgment debtor issued pursuant to it.

The action was brought for the winding-up of a partnership alleged to have existed between the appellant and the respondent, who is described in the statement of claim as a married woman, and came on for trial before the late Mr. Justice Street on the 19th April, 1894, when, as appears by the endorsement on

the record, he gave judgment by consent for the appellant for \$360, each party paying his own costs, and for the payment by the respondent of the partnership debts, she retaining all the partnership assets, and directed that judgment should not be entered for 60 days, unless the appellant should satisfy a Judge in Chambers that the respondent was about to dispose of or had disposed of her stock in trade except in the usual course of business.

Judgment was not entered until the 15th April, 1914, when it was entered as a personal judgment, and not in the form of a judgment against a married woman on a contract entered into by her during coverture, as settled in *Scott v. Morley*, 20 Q.B.D. 120. The appellant applied *ex parte* to the Master in Chambers for leave to issue execution on the judgment, the application being supported by the affidavit of the appellant, in which he deposed that the judgment remained unsatisfied except as to \$20 which had been paid on account; and on that day an order was made giving the leave, and execution was issued, pursuant to it, on the same day.

On the 16th May, 1914, the respondent gave notice that she would on the 20th May apply to the Judge presiding in Single Court for an order permitting her to appeal from the order of the Master in Chambers and for an order setting aside that order, the writ of execution issued in pursuance of it, and an appointment which the appellant had obtained for the examination of the respondent as a judgment debtor, on the grounds that the order was made without notice to the respondent, that it was obtained on insufficient evidence, that it did not revive the judgment, that the writ of execution was improperly issued, and upon other grounds. The motion came on to be heard on the 21st May, and on the 26th May, 1914, the order against which this appeal is brought was made.

I have come to the conclusion, not without regret, that the appeal fails and must be dismissed.

I am inclined to think that, had the order in Chambers been made prior to the coming into force of the new Rules, the Master's order might have been supported on the ground that special

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circumstances existed which warranted the making of it on the *ex parte* application of the appellant; but I agree with the view of the Chief Justice that under the new Rules it was not proper to make the order *ex parte*.

Rule 213 is explicit as to the necessity of notice of the application being given to the respondent. The Rule provides that "any application in an action or proceeding shall be made by motion, and notice of the motion shall be given to all parties affected by the order sought."

Mr. Wilkins contended that the order could be supported under Rule 216, but this is not so. The Rule authorises the making of an interim order *ex parte* if the Court is satisfied that the delay necessary to give notice of motion might entail serious mischief; but the order in question was not an order of that nature.

It was also contended that the time for moving against the Master's order ought not to have been extended, but that was a matter which lay in the discretion of the Chief Justice, and with the exercise of that discretion we cannot interfere. The power to enlarge the time is conferred by Rule 176.

There should be no costs of the appeal. The appellant, as the result of the order which we affirm, may have lost by a slip the possibility of ever enforcing his judgment, if his remedy is barred by the Statute of Limitations or otherwise. If notice of the application for leave to issue execution had been given, the respondent would have had no answer to it, as it is not pretended that the judgment is not unsatisfied except as to \$20 which has been paid on account of it, and the respondent may properly be left to bear her own costs of the appeal.

Having come to this conclusion, it is unnecessary for us to determine, whether, as contended by the respondent's counsel, the judgment as it has been entered is a nullity; but, as at present advised, I do not think that the contention is well-founded.

Appeal dismissed without costs.

[APPELLATE DIVISION.]

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STERLING BANK OF CANADA V. ZUBER.

Nov. 13.

Promissory Note—Completion and Delivery—Transfer to Bank by Payee before Maturity—Collateral Security—Value—Absence of Notice of Defect—Holder in Due Course—Lien—Extent of—Bills of Exchange Act, sec. 54(2)—General Banker's Lien—Exclusion by Special Memorandum—Evidence.

The defendant made a promissory note for \$250 in favour of a customer of the plaintiff bank; the note was transferred by the customer to the bank as collateral security to a draft for \$150, which was discounted by the bank for the customer, the proceeds, \$149.60, being placed to his credit. This draft was not accepted or paid. The customer had in fact no right to pledge the note, but should have given it up to the defendant:—

Held, upon the evidence, that the note was completed by the defendant and delivered as a promissory note, and was given to the bank, before maturity, for value, without notice of any defect; and so the bank became the holder in due course, and was entitled to recover from the defendant thereon to the extent of its lien, *i.e.*, \$149.60 and interest: Bills of Exchange Act, sec. 54, sub-sec. 2.

The \$150 draft had on its face, embodying the terms on which it was negotiated, and stamped by an official of the bank when it was negotiated, the words: "Surrender documents attached on payment of draft only."

The only document attached was the \$250 note:—

Held, that the bank had no general banker's lien on the note, and was not entitled to collect from the defendant and retain a sum which it had paid for costs in respect of other commercial paper given to it by the customer, even if there had been evidence that the customer was liable for those costs or had acknowledged or promised to pay them.

Judgment of MORSON, Jun. Co. C.J., York, varied.

APPEAL by the defendant from the judgment of MORSON, Jun. Co.C.J., in an action in the Tenth Division Court in the County of York, in favour of the plaintiff bank, for the recovery from the defendant of \$185.19 on a promissory note for \$250, signed by him, and transferred by the payee to the plaintiff bank as collateral security for an indebtedness.

October 9. The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A.

E. Meek, K.C., for the appellant, contended that, upon the evidence, the plaintiff bank was not entitled to succeed. Under sec. 58 of the Bills of Exchange Act, R.S.C. 1906, ch. 119, the onus is upon the bank to prove that the note was taken in due course. He relied especially on secs. 32, 56, 58, 60, 70, and 88

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of the Bills of Exchange Act, and upon *Baxendale v. Bennett* (1878), 3 Q.B.D. 525.

N. W. Rowell, K.C., for the plaintiff bank, the respondent, argued that the bank had a banker's lien upon the note for the whole indebtedness of its customer. He relied upon the findings of the trial Judge.

Meek, in reply, referred briefly to the evidence.

November 13. The judgment of the Court was delivered by MACLAREN, J.A.:—This is an appeal by the defendant from a judgment in the Division Court, Toronto, by Judge Morson, Junior County Court Judge, condemning the defendant to pay \$185.19 on a promissory note for \$250, signed by him and given by the payee to the bank as collateral security.

The defendant admitted his signature, but claimed that the note was never completed by him or delivered as a promissory note. The trial Judge has found against him on this issue, and there is ample evidence to sustain his finding. The defendant also claims that the bank only became a holder after maturity; but the trial Judge rightly finds that the note, which is dated the 12th November, 1912, payable in one month, was given to the bank on the 30th November, for value without notice of any defect, and that the bank became a holder in due course. The note was put up as collateral security to a demand draft for \$150, which was discounted by the bank, and the proceeds, \$149.60, placed to the credit of the customer. This draft was not accepted or paid.

The trial Judge gave judgment for \$185.19, being the amount of the draft and \$35.19 costs subsequently incurred by the bank on other paper given it by the customer.

In ordinary circumstances, the bank, as a holder in due course, would have been entitled to recover from the defendant the full amount of the note: *Bank of British North America v. Warren* (1909), 19 O.L.R. 257. If it recovered more than was its due, it would hold the surplus as trustee for the customer or whoever might be entitled to it: *Reid v. Furnival* (1833), 1 Cr. & M. 538.

The bank claimed that it was entitled, under its banker's

lien, to collect from defendant and retain the sum of \$35.19, the amount of its costs on other paper given to it by the customer, and the trial Judge allowed the claim. In this, I think, he was in error. The \$150 draft has on its face the following words, embodying the terms on which it was negotiated, and stamped by an official of the bank when it was negotiated: "Surrender documents attached on payment of draft only." The only document attached was and is the defendant's note for \$250. There being an express pledging as collateral, and no agreement or intention that the bank should retain the note, but on the contrary an agreement that it should at once hand it over to the drawee of the draft in case he paid it, a general banker's lien would be quite inconsistent with the agreement of the parties, and would not attach, in accordance with the principle of the maxim *expressum facit cessare tacitum*.

The customer was examined as a witness, and admitted that he had no right to pledge the note to the bank, but that he should have given it up to the defendant, and there is no evidence to the contrary.

In these circumstances, I am of opinion that the case is governed by sec. 54, sub-sec. 2, of the Bills of Exchange Act, which reads as follows: "Where the holder of a bill has a lien on it, arising either from contract or by implication of law, he is deemed to be a holder for value to the extent for which he has a lien."

The cases are not in accord as to whether a bank, when a special lien has been paid or extinguished, has a general banker's lien on the released securities for its general balance. This point, however, does not arise in this case, as the special lien was never extinguished, but still exists.

There is another point in the case, and one on which, in my opinion, the decision may be properly rested, namely, that there is no evidence that the customer was liable for the costs subsequently incurred by the bank, nor any acknowledgment of them or promise to pay them.

In my opinion, the judgment should be reduced to \$164.94,

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namely, \$149.60, the proceeds of the discount of the draft, with interest at the rate of 5 per cent., amounting to \$15.34, or \$164.94 in all. There should be no costs of the appeal.

Judgment accordingly.

[APPELLATE DIVISION.]

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UNITED TYPEWRITER CO. v. KING EDWARD HOTEL CO.

Nov. 13.

Lien—Innkeeper—Property of Stranger Brought to Inn by Guest—Innkeepers Act, 1 Geo. V. ch. 49—Supplement to Common Law.

The provisions of the Innkeepers Act, 1 Geo. V. ch. 49 (R.S.O. 1914, ch. 173), are supplementary to the common law; the statute is not a codification of the whole law as to the lien of innkeepers; and the common law right of the innkeeper to a lien on the property of a stranger brought to the inn by a guest has not been taken away by the statute.

Huffman v. Walterhouse (1890), 19 O.R. 186, and *Newcombe v. Anderson* (1885), 11 O.R. 665, 682, approved.

The main purposes of the statute defined.

Judgment of the Senior Judge of the County Court of the County of York affirmed.

APPEAL by the plaintiff company from the judgment of the Senior Judge of the County Court of the County of York dismissing an action brought in that Court to recover a typewriting machine, the property of the plaintiff company, brought to the defendant company's hotel by a guest, and detained by the defendant company in the assertion of an innkeeper's lien.

October 20, The appeal was heard by MEREDITH, C.J.O., GARROW, MACLAREN, and MAGEE, JJ.A.

Gideon Grant, for the plaintiff, admitted that in England the hotelkeeper would be entitled to retain possession of the typewriter, but contended that the law respecting innkeepers was different in Ontario, because it was governed by the Innkeepers Act, 1 Geo. V. ch. 49 (R.S.O. 1914 ch. 173), which limits the common law right. The rule of construction to be applied is that respecting statutes which are a codification of the law: *Beal's Cardinal Rules of Legal Interpretation*, 2nd ed., p. 355. He submitted that the lien of the hotelkeeper in On-

tario was controlled by sec. 3, sub-sec. 1, of the Innkeepers Act, R.S.O. 1914, ch. 173. He referred to Beale on Innkeepers and Hotels, para 265; *Bank of England v. Vagliano Brothers*, [1891] A.C. 107, at p. 120; *Robinson v. Canadian Pacific R.W. Co.*, [1892] A.C. 481. The innkeeper has a lien on the interest only of the guest in the goods brought in by him: Halsbury's Laws of England, vol. 17, p. 325; *Broadwood v. Granara* (1854), 10 Ex. 417.

H. E. Rose, K.C., for the defendant, argued that the statute had not abridged the common law right of the innkeeper, but that the statute was supplementary to the common law: *Newcombe v. Anderson* (1885), 11 O.R. 665, at p. 682; *Huffman v. Walterhouse* (1890), 19 O.R. 186. Nor was the statute a codification of the whole law as to the lien of innkeepers. See 1 Geo. V. ch. 49, sec. 3, sub-sec. 2.

November 13. The judgment of the Court was delivered by MEREDITH, C.J.O.:—This is an appeal by the plaintiff from the judgment of the County Court of the County of York, dated the 1st June, 1914, which was directed to be entered by the Senior Judge of that Court, after the trial of the action before him sitting without a jury on the 14th May, 1914.

The question for decision is, whether or not the common law right of an innkeeper to a lien on the property of his guest brought to his inn has been limited by 1 Geo. V. ch. 49, now R.S.O. 1914, ch. 173, so as to deprive the innkeeper of the lien which it is admitted by the appellant he would have had at common law on the property of a stranger brought to his inn by the guest.

In our opinion, this common law right of the innkeeper has not been taken away by the statute. That was the view expressed by Galt, C.J., in delivering the judgment of a Divisional Court in *Huffman v. Walterhouse*, 19 O.R. 186, 188-9, and was evidently the view of Armour, J., in *Newcombe v. Anderson*, 11 O.R. 665.

That the statute is a codification of the whole law as to the lien of innkeepers was contended by counsel for the appellant,

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but the statute contains internal evidence that that was not intended, for sub-sec. 2' of sec. 3 of 1 Geo. V. ch. 49 provides that the persons mentioned in the sub-section, among whom are innkeepers, shall have the rights which the sub-section confers, in addition to all other remedies provided by law.

The provisions of the statute are, in our opinion, supplementary to the common law, and its main purposes were: (1) to extend the right of lien which an innkeeper has to boarding house keepers and lodging house keepers, limited in their case to the property of the boarder or lodger: (2) to give, where the lien exists either at common law or by the statute, the right to sell; and (3) to limit the liability of the innkeeper to \$40 in certain cases and in certain other cases to \$5.

It follows from this conclusion that the respondent is entitled to the lien which it claims, and that the appeal should be dismissed with costs.

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[APPELLATE DIVISION.]

RE FINUCANE AND PETERSON LAKE MINING CO. LIMITED.

Crown Patent—Construction—Description of Land—Falsa Demonstratio—Reference to Recorded Plan.

A tract of land granted to the respondents by letters patent from the Crown was described therein as being in a certain township, containing a certain number of acres, and being composed of mining location S.V. 476, being land covered with the water of Peterson Lake, in front of certain other mining locations named, as shewn on a plan of survey by W., of record in the Department of Lands Forests and Mines. W.'s plan shewed that the whole of Peterson Lake was included in mining location S.V. 476:—

Held, that the controlling words of the description were those referring to the mining location by its number as shewn on W.'s plan; and the other part of the description, if it was not an accurate description of the mining location as so shewn, must be rejected as *falsa demonstratio*. Decision of the Mining Commissioner affirmed.

APPEAL by Finucane from an order of the Mining Commissioner, dated the 19th July, 1914, affirming the decision of the Mining Recorder at Haileybury, dated the 18th April, 1914, refusing the appellant's application to record a mining claim for a small piece of land, upon the ground that it formed part of

the bed of Peterson Lake, which had previously been granted to the Peterson Lake Mining Company Limited, the respondents.

October 22. The appeal was heard by MEREDITH, C.J.O., GARROW, MACLAREN, and MAGEE, JJ.A.

McGregor Young, K.C., for the respondents, raised a preliminary objection to the appeal, contending that it had not been regularly brought, the provisions of sec. 152 (2) of the Mining Act of Ontario, R.S.O. 1914, ch. 32, not having been complied with; and that the Court had no power to extend the time for setting down the appeal. He referred to *Re Rogers and McFarland* (1909), 19 O.L.R. 622.

The Court decided to hear the appeal subject to the objection, and gave leave to counsel for the appellant (if necessary) to put in a written argument in answer to the objection.

The argument of the appeal was then proceeded with.

C. A. Masten, K.C., and *L. C. Outerbridge*, for the appellant, argued that the grant to the respondents did not cover the whole of the bed of Peterson Lake. The controlling words of the description were, "being land covered with the water of Peterson Lake in front of mining locations R.L. 404, R.L. 405, R.L. 406, R.L. 407, and R.L. 408, including also islets therein," and, as the land in dispute was not in front of these locations, it did not pass by the grant. Ward's plan, referred to in the grant, shewed the whole of the bed of the lake marked red. But that could not be taken to shew accurately the lands in dispute, because it was repugnant to the terms of the grant, and must be rejected on the principle of *falsa demonstratio non nocet*: *Horne v. Struben*, [1902] A.C. 454; *Eastwood v. Ashton*, [1914] 1 Ch. 68; *Dublin and Kingstown R.W. Co. v. Bradford* (1857), 7 Ir. C.L. 57; *Roe v. Lidwell* (1860), 11 Ir. C.L. 320, at p. 325; *Willis v. Watney* (1881), 51 L.J.N.S. Ch. 181; Beal's Rules of Legal Interpretation, 2nd ed., p. 178; *Brady v. Sadler* (1890), 17 A.R. 365, at pp. 376, 377.

McGregor Young, K.C., for the respondents, supported the decision of the Mining Commissioner. The very rule of construction depended upon by the appellant militated against him,

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because the description of the land as mining location S.V. 476, as shewn on Ward's plan, was clear and unambiguous; and, if the reference to other locations conflicted with that description, they should be rejected as sinning against the rule of *falsa demonstratio*. The plan was the clearest and best way of identifying the property: *Bartlet v. Delaney* (1913), 29 O.L.R. 426, at p. 438; *Hyatt v. Mills* (1890), 20 O.R. 351.

Masten, in reply.

November 13. The judgment of the Court was delivered by MEREDITH, C.J.O.:—This is an appeal by Finucane from an order of the Mining Commissioner, dated the 19th July, 1914, affirming the decision of the Mining Recorder at Haileybury, dated the 18th April, 1914, refusing to record a mining claim for a small piece of land, on the application of the appellant.

The refusal to record this claim was based on the assumption that the land in respect of which the claim was made, which forms part of the bed of Peterson Lake, had already been granted to the respondents; and the sole question for decision is, whether or not the grant to the respondents covers the bed of the whole of Peterson Lake.

The letters patent by which the grant to the respondents was made are dated the 5th July, 1907, and the land granted is described as "all that parcel or tract of land and land covered with water situate lying and being in the township of Coleman . . . containing by admeasurement 195 acres be the same more or less, which said parcel or tract of land and land covered with water may be otherwise known as follows, that is to say, being composed of mining location S.V. 476 being land covered with the water of Peterson Lake in front of mining locations R.L. 404, R.L. 405, R.L. 406, R.L. 407, and R.L. 408, including also islets therein situate in the said township of Coleman as shewn on plan of survey by Ontario Land Surveyor A. T. Ward, dated February 9th, 1905, of record in the Department of Lands Forests and Mines, heretofore under mining lease 3508, dated May 1st, 1905."

Mining lease 3508 contains the same description, except that

there is added to the description the words "a duplicate of which plan is attached to these lease letters."

Mr. Ward's plan which, as the letters patent state, is of record in the Department of Lands Forests and Mines, shews that the whole of Peterson Lake is included in mining location S.V. 476, and that is, in my opinion, decisive in favour of the respondents.

It was argued by counsel for the appellants that the controlling words of the description are, "being land covered with the water of Peterson Lake in front of mining locations R.L. 404, R.L. 405, R.L. 406, R.L. 407, and R.L. 408, including also islets therein," and that, as it was also contended, the land in question, not being in front of these locations, did not pass by the grant.

In my opinion, neither contention is well-founded. Read even in its narrowest and most literal sense, mining location S.V. 476 is in fact shewn on Ward's plan in front of one or other of the mining locations mentioned in the letters patent. Mining location R.L. 406 is irregular in form, and is bounded on its irregular side by the lake, part of the location lying to the north and the remainder of it to the west of the lake, and the whole of the southerly end of the lake lies in front of the northerly part of the location.

But, if it were otherwise, the contention must fail. The controlling words of the description are those referring to the mining location by its number as shewn on Ward's plan; and the other part of the description, if it is not an accurate description of the mining location as so shewn, must be rejected as *falsa demonstratio*.

The rule of construction invoked by the appellant's counsel makes against their contention; the cases cited by them establish that where the lands intended to be conveyed are accurately and completely described the description is not controlled by reference to a plan on which they are stated to be shewn.

An illustration of the application of this rule is to be found in *Horne v. Struben*, [1902] A.C. 454. In that case the northern boundary of the land was said to be the Steenbrazem River, and

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the words in the grant which introduced the diagram which it was contended controlled the description in what Lord Robertson called the text of the title, were, "as will further appear by the diagram framed by the surveyor," and it was held that the text of the title was unambiguous, and that, as the diagram contradicted it, the diagram must give way to the text.

This and like cases are but instances of the application of the maxim *falsa demonstratio non nocet*; and, instead of it assisting the appellant, it makes against him, for the description of the land as mining location S.V. 476 as shewn on Ward's plan is clear and unambiguous, and, if the reference to the other locations contradicts this description, it must, applying the maxim, be rejected.

An illustration of the rejection as *falsa demonstratio* of words of description which contradict a plan which described the lots by their numbers according to it, is to be found in *Llewellyn v. Earl of Jersey* (1843), 11 M. & W. 183, 63 R.R. 569.

In the case of a grant of a lot in a Crown survey by number, concession, and township, the whole lot would pass notwithstanding that the land was also described by metes and bounds which embraced only part of the lot; and, in my opinion, the case at bar does not differ from such a case. Here the lot is described by its number according to a plan of survey, of record in the Department of Lands Forests and Mines, and therefore adopted as a Crown survey; and, even if the words on which the appellant relies have the meaning which he seeks to attach to them, they must be rejected as *falsa demonstratio*.

In my opinion, the appeal fails and must be dismissed with costs.

Having come to the conclusion that the appeal fails on the merits, it is unnecessary for us to determine the question raised by Mr. Young as to the competency of the appeal.

Appeal dismissed.

[APPELLATE DIVISION.]

1914

REUCKWALD v. MURPHY.

Nov. 13.

Company—Action against Directors—Ontario Companies Act, 2 Geo. V. ch. 31, sec. 96—Enforcement of Judgment for Wages—Discontinuance against one Director Resident out of the Jurisdiction—Joint and Several Liability—Practice — Parties — Non-joinder — Contribution — Rules 67, 134, 165.

In this action the plaintiff sought payment from the several defendants, as directors of an incorporated company, of the amount of a judgment recovered by him against the company for wages due to him as a workman employed by the company. The action was begun within a year from the time that the defendants ceased to be directors; but, after the expiration of the year, it was discontinued against the defendant K., who was a resident of a foreign country:—

Held, that, as the liability of the defendants as directors, under sec. 96 of the Ontario Companies Act, 2 Geo. V. ch. 31, was several as well as joint, the plaintiff was entitled to sue them separately, and was not bound to join all of them as defendants; he was entitled also, under Rule 67, to sue one or more or all of them in the same action.

The defendant K. was not a necessary party to an action to enforce the several liability of the directors; nor, if the liability had been joint only, could the other defendants have succeeded in a motion under Rule 134 to add K. as one who ought to have been joined as a defendant, he not being within the jurisdiction.

Rule 134 applies only in the case of a person who ought to have been joined or whose presence is necessary in order to enable the Court effectually and completely to adjudicate upon the questions involved; and, K. not being a necessary party, the other defendants would not have been entitled to insist upon his being added as a defendant for the purpose of claiming contribution against him, and so were not prejudiced by the course taken by the plaintiff in first joining K. and then discontinuing against him after the year mentioned in sec. 96 had elapsed; the other defendants, if they desired contribution from K., could invoke the third party procedure, Rule 165.

Judgment of the District Court of the District of Nipissing, affirmed.

AN appeal by the defendants other than the defendant Kohler from the judgment of the Senior Judge of the District Court of the District of Nipissing in favour of the plaintiff in an action brought in that Court to recover from the defendants, as directors of an incorporated company, the amount of a judgment recovered against the company for wages due to the plaintiff as a workman employed by the company.

The defendant Kohler lived in a foreign country, and as against him the plaintiff discontinued the action.

September 30. The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A.

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G. H. Kilmer, K.C., for the appellants, argued that the plaintiff, by discontinuing the action against the defendant Kohler, after the year mentioned in sec. 96 of the Companies Act, 2 Geo. V. ch. 31, had elapsed, released the other defendants, because the defendant Kohler was a necessary party to the action; and, if he had not been joined in the first instance, the appellants might have had him added.

H. D. Gamble, K.C., for the plaintiff, respondent, argued that, as the defendant Kohler was a resident of the United States and out of the jurisdiction, the plaintiff was not bound to join him as a party. In *MacArthur v. Hood and Miller* (1885), Cab. & El. 550, Day, J., said that it was necessary that the defendant raising such a point should shew that the co-contractor of whose non-joinder he complained was within the jurisdiction. See also *Wilson Sons & Co. Limited v. Balcarres Brook Steamship Co.*, [1893] 1 Q.B. 422.

November 13. The judgment of the Court was delivered by MEREDITH, C.J.O.:—This is an appeal by the defendants other than Kohler from the judgment of the District Court of the District of Nipissing, dated the 11th June, 1914, which was directed to be entered by the Senior Judge of that Court, after the trial of the action before him sitting without a jury, on that day.

The respondent's action is brought to recover against the appellants and Kohler, as directors of the W.S.M.K. Mining Company Limited, the amount of a judgment recovered by the respondent against the company on the 26th February, 1913, for wages due to the respondent as a workman employed by the company.

Kohler is a resident of the United States of America, and, pending the action, it was discontinued against him.

The contention of the appellants is, that, by discontinuing his action against Kohler, after the expiration of a year from the date when he and the appellants ceased to be directors, the respondent lost his right to recover against the appellants.

According to the finding of the learned Judge, the appel-

lants and Kohler ceased to be directors on the 18th November, 1912.

The action was commenced on the 5th May, 1913, against the appellant James Edward Murphy the younger, and the other defendants were added by order on the 27th October, 1913, and the notice of discontinuance was given on the 26th March, 1914.

The company was incorporated under the Ontario Companies Act, and the liability of the directors depends upon the provisions of sec. 96 of the Ontario Companies Act, 2 Geo. V. ch. 31, now sec. 98 of ch. 178 of R.S.O. 1914.

So far as its provisions bear upon the question for decision, sec. 96 provides as follows:—

“(1) The directors of the company shall be jointly and severally liable to the labourers, servants, and apprentices thereof for all debts not exceeding one year’s wages due for services performed for the company while they are such directors respectively.

“(2) A director shall not be liable under sub-section 1 unless

“(a) The company has been sued for the debt within one year after it has become due and execution has been returned unsatisfied in whole or in part; or,

“(b) The company has within that period gone into liquidation or has been ordered to be wound up and the claim for such debt has been duly filed and proved,

“nor unless he is sued for such debt while a director, or within one year after he has ceased to be a director.”

The liability of the directors being several as well as joint, the respondent was entitled to sue them separately, and was not bound to join all of them as defendants. He was also entitled to sue one or more or all of them in the same action: Rule 67.

The defendant Kohler was not a necessary party to the action to enforce the several liability of the directors; nor, if the liability had been joint only, could the other defendants, under the old practice, if he had not been made a defendant, have taken advantage of his not having been joined, as it was necessary to a plea in abatement for non-joinder of a joint debtor to shew that he “resided within the jurisdiction of the Court:” Tidd’s Prac-

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tice, p. 319; and the same rule, I apprehend, applies under the present practice where a defendant seeks under Rule 134 to add persons who he alleges ought to have been joined as defendants: *Wilson Sons & Co. Limited v. Balcarres Brook Steamship Co.*, [1893] 1 Q.B. 422; *Robb v. Murray* (1890), 13 P.R. 397, and cases there cited: *Aikins v. Dominion Live Stock Association of Canada* (1896), 17 P.R. 303.

It was argued on behalf of the appellants that the course taken by the respondent of first joining Kohler as a defendant and then discontinuing as to him, after the year mentioned in sec. 96 had elapsed, had prejudiced the appellants, because, as it was contended, had he not been originally made a defendant, the appellants could have obtained an order under Rule 134 adding him as a defendant for the purpose of claiming contribution from him.

This contention is not, in my opinion, well-founded. The Rule applies only in the case of a person who ought to have been joined or whose presence is necessary in order to enable the Court effectually and completely to adjudicate upon the questions involved in the action; and Kohler is not a necessary party, and his presence is not required for the purpose mentioned in the section. If the appellants are entitled to contribution or indemnity from or any other relief over against Kohler, the third party procedure, Rule 165, enables them to take proceedings to enforce their rights, although Kohler is not a party to the action; and, in my opinion, the appellants would not have been entitled to insist upon Kohler being added as a defendant.

If the appellants were right in their contention, the respondent would be in a worse position than he would have been in if the directors' liability had been joint only.

In my opinion, the judgment is right, and should be affirmed, and the appeal should be dismissed with costs.

Judgment accordingly.

[APPELLATE DIVISION.]

WATSON V. CANADIAN PACIFIC R.W. Co.

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Nov. 13.

Railway—Carriage of Goods—"Settlers' Effects"—Reduced Rate—Contract—Scope of Agent's Authority—Legality of Contract—Railway Act, R.S.C. 1906 ch. 37, sec. 341.

Goods carried by the defendant railway company for the plaintiff were settlers' effects, and were so described in the bill of lading. The company's agent at the shipping-point inadvertently stated a rate lower than the plaintiff was charged at the delivery-point. He paid, under protest, the amount demanded, and brought this action to recover the excess:—

Held, that, the contract for the transportation of the goods having been fully performed, and the fixing of the rate being within the apparent scope of the agent's authority, the contract governed the right to recovery, unless it was contrary to the Railway Act of Canada.

And *held*, that the contract was not contrary to the statute, the fixing of a specific "reduced rate" for one lot of "settlers' effects" being authorised by sec. 341 (b)—though it was contended that the section applied only to a rate made upon all settlers' effects and open to all persons shipping them.

Section 341 is intended to deal with exceptional cases of traffic upon a wholly different basis from that underlying the tolls and tariff sections, which cover the main general business of railway companies.

Sections 77, 315, 317, 319, 320, 326, and *City of Toronto v. Grand Trunk R. W. Co. and Canadian Pacific R.W. Co.* (1910), 11 Can. Ry. Cas. 365, considered.

Judgment of the County Court of the County of Kent affirmed.

APPEAL by the defendant company from the judgment of the County Court of the County of Kent.

The action was brought to recover the difference between the amount specified by the defendant company's agent at Mission Junction, British Columbia, as payable on a car-load of settlers' effects shipped by the plaintiff there, and the amount demanded by the defendant company's agent at Chatham, and paid by the plaintiff under protest. The judgment of the County Court was in favour of the plaintiff for the recovery of \$174.75 with costs.

April 9 and 27. *W. N. Tilley* and *J. D. Spence*, for the appellant company, argued that the shipper had no right to rely on the representations of the agent; and that there was a statutory obligation on the appellant company to exact certain rates, which could not be departed from, and which exceeded those agreed on by the agent.

R. L. Brackin, for the plaintiff, respondent, argued that the judgment of the trial Judge was right, and was supported by the law and the facts.

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September 21. Further argument was made at the request of the Court.

W. N. Tilley, for the appellant company, argued that the rate charged to the respondent was the result of inadvertence, and that it was not within the scope of the agent's authority to charge such a rate, under sec. 341* of the Railway Act, R.S.C. 1906, ch. 37, or otherwise. That section applies only to a rate made upon all settlers' effects and open to all persons shipping them. He referred to *City of Toronto and Town of Brampton v. Grand Trunk and Canadian Pacific R.W. Companies* (1910), 11 Can. Ry. Cas. 370, a decision of the Board of Railway Commissioners, and *City of Toronto v. Grand Trunk R.W. Co. and Canadian Pacific R.W. Co.* (1910), *ib.* 365, in the Supreme Court of Canada.

J. M. Ferguson, for the respondent, contended that the whole question was covered by sec. 341 of the Act.

November 13. The judgment of the Court was delivered by HODGINS, J.A.:—Section 341 of the Railway Act, R.S.C. 1906, ch. 37, seems to dispose of this case without reference to the question so fully argued. But for that section the respondent would have had difficulty in establishing his claim. To recover back what he paid, he would have to set up and prove a contract which, if contrary to the statute, would be void.

The goods carried were "settlers' effects," and are so described in the bill of lading. The contract for their transportation has been fully performed; and, while it is clear that the rate stated was the result of inadvertence, it was within the apparent scope of the agent's authority, and the contract would govern the right of recovery in this case unless it was contrary to the statute and in that way an illegal one.

But it was argued that sec. 341 did not cover the situation here, but applied only to a rate made upon all settlers' effects

*341. Nothing in this Act shall be construed to prevent,— . . . (b) the issue of mileage, excursion or commutation passage tickets, or the carriage at reduced rates of immigrants or settlers and their goods or effects. . . . Provided that the carriage of traffic by the company under this section may, in any particular case, or by general regulation, be extended, restricted, limited or qualified by the Board.

and open to all persons shipping them. In other words, that "reduced rates" did not include a specific bargain to carry one lot of these goods.

I do not see anything in sec. 341 to refute the contention that a specific reduced rate may be made under it. The design of the Act to compel equality of treatment in the carriage of traffic is explicitly set out in certain sections, but the opening words of sec. 341 exclude these as controlling, *inter alia*, the carriage of settlers' effects at reduced rates. They are that "nothing in this Act shall be construed to prevent" such carriage at the reduced rates. How, then, can the Court insist on a construction applying these very sections, relief from which is expressly given?

In the case of *City of Toronto and Town of Brampton v. Grand Trunk and Canadian Pacific R.W. Companies*, 11 Can. Ry. Cas. 370, and in the case in the Supreme Court of Canada, *City of Toronto v. Grand Trunk R.W. Co. and Canadian Pacific R.W. Co.*, *ib.* 365, it was held that sec. 77 applied to the issue of commutation tickets under sec. 341. That decision, it was argued, shews that all reduced rates made under sec. 341 must be shewn to be free from undue preference or unjust discrimination; implying thereby that they must be open to more than one person. This would eliminate such a situation as the present.

There are several answers to this, I think. The decision of the Supreme Court was in a case where from its nature tickets must be issued to more than one person. Besides this, if the decision could be read as applying to every case under sec. 341—a conclusion certainly not warranted by the report—it may be fully complied with when the Railway Board's intervention, under the proviso with which sec. 341 concludes, is invoked. Neither sec. 77 nor the proviso operates to prevent the reduced rate being made, but they in fact assume its existence, and only give power to the Board to extend, restrict, limit, or qualify it. If the rate in question here, when granted and acted upon, was shewn to be limited in its operation to one specific instance, it might be extended by the Board to cover all similar cases: a possible consequence which the railway company must bear in

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mind when making its bargain. But that falls far short of prohibiting its being made at all.

Then again the carriage of traffic for the Dominion free or at reduced rates necessarily cannot include carriage for any other than the named shipper. Section 77 cannot be applied in the case of free carriage, for it is limited to the charging of lower tolls, and does not apply to cases where no charge is made.

It must also be borne in mind that if a lower and non-discriminating rate for all settlers' effects is what is provided for, then there is no necessity for sec. 341. Section 326, sub-sec. 3, already gives power to lower the tolls on any class or classes of freight classification, and at the same time that lower rate is subject to sec. 315, which provides for equality of treatment. The use of the words "reduced rates" indicates something less than the usual or normal rates previously fixed or used. The proviso at the end of sec. 341, to which I have referred, is, therefore, on this point, a wholly unnecessary clause if sec. 319 governs, as it must do if action under sec. 341 is only to be upon the terms of equality to all.

It may be remarked in passing that in the *Brampton* case (*ante*) the question submitted to the Supreme Court was, whether sec. 341 was modified or affected by sec. 77 or any other section of the Act. The answer that sec. 77 is applicable may, therefore, have been intended to exclude the other sections, such as 315, 317, 319, and 320, which relate to the same subject-matter as 77.

These considerations indicate that the section now in question is intended to deal with exceptional cases of traffic upon a wholly different basis from the one underlying the tolls and tariff sections, which cover the main general business of railways. Unless, therefore, the section in question is so expressed as to carry into its provisions some inherent disability not derived solely from the other sections of the Act, its plain terms should govern.

It is unnecessary to consider the liability which, it was said, would flow from erroneous quotation of rates acted upon by the shipper, or the effect of the bargain in this case treated as an illegal contract. But it may be pointed out that by the inter-

pretation section of the Railway Act the word "charge," when used as a verb with respect to tolls, includes "to quote;" so that the statement of the rate, if different from the tariff rate, is prohibited by sec. 315. This seems to weaken somewhat the reasoning upon which *Urquhart & Co. v. Canadian Pacific R.W. Co.* (1909), 2 Alta. L.R. 280, 12 Can. Ry. Cas. 500, is founded.

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Appeal dismissed with costs.

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RE BRANTFORD GOLF AND COUNTRY CLUB AND LAKE ERIE AND
NORTHERN R.W. Co.

Nov. 13.

Railway—Expropriation of Land—Taking Part of Golf Course—Compensation—Value of Land—Advantageous Use—Cost of Acquiring Additional Land—Award—Appeal—Increase in Amount—Allowance for Reconstruction of Course—Damage to Club-house from Railway.

The railway company having taken $8\frac{8}{10}$ acres out of 76 acres belonging to the club and laid out as a golf course, and having by the construction of the railway severed $6\frac{1}{2}$ acres from the rest, it was held, that the club were not bound to put up with such a course as could be laid out on the 67 acres left, nor to play over the railway lands; and the cost of acquiring other premises (15 acres), suitable and convenient, was a fair test of the damage suffered by the club.

The Queen v. Burrow, Metropolitan R.W. Co. v. Burrow (1884), London Times 24th January and 22nd November, 1884, Boyle and Waghorn on Compensation, p. 1052, and Hudson on Compensation, p. 1521, and *City of Edinburgh v. North British R.W. Co., Princes' Street Gardens Arbitration* (1892), Hudson, p. 1530, applied.

Where the most advantageous use has been made of property by its owner, it is that value that the taker must pay, and the taker cannot reduce that value by limiting the damage to what lies immediately near the part taken, if the owner suffers through his whole property by its being reduced to an area too restricted to be used to the same advantage as that which the whole afforded.

The award of arbitrators of \$7,240 as compensation to the club for land taken for the railway, under the Railway Act of Canada, and land injuriously affected, was increased on appeal to \$18,059, allowance being made for the acquisition of additional acreage, for sewer piping, etc., taken and rendered useless, for reconstructing and providing tees and greens, and for damage to the club-house from smoke, noise, and vibration.

APPEAL by the club from an award of a majority of a board of three arbitrators, made on the 5th May, 1914, under the Railway Act of Canada, fixing at \$7,240 the compensation to

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be paid to the club by the railway company for lands taken for the railway and for the injurious affection of the remainder of the club's lands, the whole having, before the taking, been used as a golf course.

September 22 and 23. The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A.

W. T. Henderson, K.C., for the appellants, argued that the majority of the arbitrators had made no sufficient allowance for the depreciation of the property as a golf course, through the taking of their land by the respondents. A golf course is laid out with the idea of starting from and ending at the club-house. The railway will now run right through the green and destroy the end-hole. A proper course cannot be laid out on the remaining land, unless more land is acquired. No sufficient allowance has been made for the destruction of the beauty of the view. An offer has been made to give a crossing, but all that the respondents could give would be a farm crossing, and in any case it would not be a lawful crossing for the purpose in question. He referred to *North Shore R.W. Co. v. Pion* (1889), 14 App. Cas. 612, followed in *Bigaouette v. North Shore R.W. Co.* (1889), 17 S.C.R. 363.

W. S. Brewster, K.C., for the respondents, argued that, the property in question being real estate, experts in that business were the most competent witnesses as to its value. It is impossible to get evidence before the Court as to the value of the ground considered as a golf course. There is practically as good a course left to the appellants as they had before. The arbitrators viewed the property and saw and heard the witnesses, and the award of the majority should not be set aside.

November 13. The judgment of the Court was delivered by HODGINS, J.A.:—There is a curious absence of evidence dealing directly with the problem presented in this case. The appellants have a well laid out and interesting golf links, consisting of 76 acres. Part of this is on high level land, and the rest of it consists of a fairly steep hillside, running down at the west end

to flat land fronting on the river, while at the east end the slope goes down to the river.

The respondents' railway enters at the east end, on the slope and above the river, and runs west for a short distance, then encroaches on the flat land, cutting it in two. The length of the railway on the club property is 2,415 feet, and it takes about 8 acres. Six acres of the flat land lies to the south of the railway lands, and 20 acres to the north, under the crest of the slope. The club-house is on top of the high bank, just near the east end.

The coming of the railway has, in the appellants' contemplation, ruined the golf links as a course, necessitating the acquiring of other lands on the level to make up. The respondents contend that the land left by them, if three holes are rearranged and play goes on across the railway, is ample and convenient for the appellants, and that the damage is small. The award is based on this view.

It might be supposed that the value of the adjoining land, which the appellants' golf expert says they will naturally have to acquire, would have been directly stated. To the one side it represents what they would have to spend to put themselves about where they were, and to the other side it would form a good criterion of the value of the present course as a whole and afford a standard by fixing the selling price of land adjoining.

Neither side, however, provided the arbitrators with definite information on this point, nor with the value of the Britton farm spoken of by Cummings, which, though similar, is, he says, rather inaccessible. One golf expert was called on each side, and two real estate experts. The golf experts could not speak of the value of the property as a whole nor by the acre. The real estate experts called for the appellants, while valuing the place as a whole, do not profess to have any knowledge or experience regarding the value of golf courses as such. Those called by the respondents exhibit a similar want of information on this branch, and depend on the price of farm and market garden lands in the neighbourhood for their standard of compensation.

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In the result, what seems to me to be the best test to apply in approaching the question was not fully considered by the arbitrators. That the cost of acquiring other premises, suitable and convenient, would be a fair test of the damage suffered by the appellants, appears from two cases. One is *The Queen v. Burrow*, in the Court of Appeal in England, and in the House of Lords *sub nom. Metropolitan R.W. Co. v. Burrow*, reported in the *London Times* of the 24th January and 22nd November, 1884, and printed in full in Boyle and Waghorn on Compensation, p. 1052, and in Hudson on Compensation, p. 1521. The other is *City of Edinburgh v. North British R.W. Co., Princes' Street Gardens Arbitration* (1892), which is also to be found in Hudson, p. 1530, where the award was made by Lord Shand as arbitrator.

In the first case the claimants had carried on business for five years as manufacturers of wine bins, etc., in London, under a twenty-year lease at £200 per annum. Their annual loss for the five years was about £380 per annum, so that as a business there was no element of profit, and the rent was a rack rent, rendering the lease unsaleable. They acquired other premises, for which they had to pay £450 per annum, and claimed the value of the additional rent for a like term of years, and the cost of necessary alterations of and fixtures for the new premises, damages for removal and damage to stock, all amounting to £5,500. They were allowed £3,000. It was argued for the railway company that the respondents were not entitled to base their claim upon the cost of establishing their business, but on the value of the lands taken, and the damage sustained as regards such lands by the exercise of the powers of the company, and that, if the value was £1,000, the jury could not give more for the expense of reinstatement. In the Court of Appeal, the Master of the Rolls, Sir George Jessel, during the argument, while denying that the damages were really "reinstatement," said (*Times*, 24th Jan.): "They had a right—apart from the compulsory powers of the statutes—to carry on their business where they were, and if you compulsorily displace them, surely they are entitled to the cost of getting other premises, as nearly as possible as good as those they have lost, and if these new pre-

mises cost more than the other, surely you must pay the additional expenses thus thrown upon them." The appeal was dismissed by the House of Lords without calling upon the respondents.

The other case arose from the taking of part of the gardens, lying between Princes' Street and Castle Rock in Edinburgh for the Waverley Station, and presented great difficulty in arriving at a standard of value, the gardens being unique and in existence for over seventy years. Lord Shand, in deciding that the principle of so-called "reinstatement" could not be applied owing to these circumstances, observes (Hudson, at p. 1531): "If the company could have pointed to garden ground which might be got on reasonable terms, and which, from its situation, would form a fair substitute for the ground taken, and as such might be added to the gardens, the cost of such reinstatement might form a just measure of the compensation to be paid for the ground appropriated."

That method, approved in both these cases, is, of course, not the only way of arriving at the compensation to be paid, but it is the one most likely to do justice between the parties. That adopted in the award was as follows. The value of the land actually taken, $8\frac{8}{10}$ acres, was fixed as "\$300 per acre as part of the club property, including the water pipes, etc., on it." Then as to the land lying to the south of the railway and between it and the river, $6\frac{3}{4}$ acres, \$600 is allowed as damages by severance. The remainder of the golf course is dealt with thus: "Of the balance of the land north of the railway, only part will sustain damage from the severance and from the purpose for which the land taken is to be used. As damage to this land for its present use, including improvements, excepting buildings, we allow \$1,750, being 10 per cent. of what we consider to be its greatest value."

It is to be observed that if the $6\frac{3}{4}$ acres which was used as part of the golf course is worth \$300 per acre, the amount allowed for similar land adjoining and taken, its value would be \$2,000, on which damage to the extent of 30 per cent. is given, which does not comprise anything for smoke, vibration, and noise. For the balance only 10 per cent. is given, including

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such damage. Nor is it clear to what part this 10 per cent. applies. It is stated to be based on part only of the 61 acres north of the railway, and that part is apparently valued at \$17,500.

It is impossible to say how many acres this represents, nor what percentage of value has been deducted for damage to the level land, nor indeed for the flat land and hillside.

It will not be disputed, I think, that, from the evidence of both golf experts, the hillside and flat land beside the river, in combination with the higher level, added to the charm and interest of the golf links as a playing course, both as relieving the monotony of perfectly flat ground and as presenting features of difficulty. Nor is there the smallest doubt, upon the evidence, that the combination as existing and laid out enhanced the value of the course as a playing field, a value which should have been reckoned with as a whole. The figures I have quoted, the division into separate parcels, and the comparison of this flat land with the parcels to the east, described in the award as "finely wooded, picturesque, and improved country gentlemen's residences," all shew clearly that the arbitrators have in fact ignored the relation which the land taken, and that said by them to be injured, bears to the whole 76 acres laid out and used as a complete and entire golf course.

The taking of the $8\frac{8}{10}$ acres and the severance of the $6\frac{3}{4}$ acres have reduced the extent of the links and necessitated enlargements in another direction and a rearrangement of the course. The respondents found the club in possession and using the whole 76 acres, and each acre viewed as a necessary part of the course is equally valuable to it, if its taking so reduces the area as to require a further purchase. The club is not bound to put up with such a course as can be laid out on the 67 acres left, nor to play over the railway lands. They are entitled to the value of the land to them for the purpose for which they are using it.

Lord Dunedin in *Cedar Rapids Manufacturing and Power Co. v. Lacoste*, [1914] A.C. 569, states the rules thus, at p. 576: "(1) The value to be paid for is the value to the owner as it

existed at the date of the taking, not the value to the taker. (2) The value to the owner consists in all advantages which the land possesses, present or future, but it is the present value alone of such advantages that falls to be determined."

Where, as here, the most advantageous use has been made of the property by its owners, it is that value that the taker must pay, and the taker cannot reduce that value by limiting the damage to what lies immediately near the part taken, if the owner suffers throughout his whole property by its being reduced to an area too restricted to be used to the same advantage as that which the whole afforded. That principle is well established, and it is just as applicable to golf courses as to a tract of land dedicated to sport, such as a race course, or a motordrome, or used as a park or rifle range. See *Holt v. Gas Light and Coke Co.* (1872), L.R. 7 Q.B. 728; *In re Countess Ossalinsky and Manchester Corporation* (1883), Browne and Allan's Law of Compensation, p. 659. The award has completely ignored this aspect, and ought to be revised in the light of it.

If the appellants have to acquire enough land on the level to compensate for what has been taken, what has been severed, and what has, in the opinion of their golf expert, been rendered useless, they must buy about 35 acres. But it seems unreasonable to hold that it is impossible to use the 20 acres remaining north of the railway in combination with the hillside. This area is large and ought to be available for the purposes of the game.

To do without it would deprive the course of a feature rightly prized by golfers, and I prefer to believe that, when the appellants settle down to rearrange their links in view of the changed condition, they will find some good use to which it can be put. If so, it leaves only about 15 acres to be acquired.

This latter acreage, at the value placed on the level land by the appellants' witnesses for residential purposes, would represent \$15,000, and at that fixed by the respondents' witnesses \$4,500. The total allowed by the arbitrators as representing what is taken and severed and damaged is \$4,990.

I think it may be fairly, upon the principle of the *Burrow* and *Edinburgh* cases, be placed at the higher figure, having re-

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gard to the injury done to the appellants' links as an entire and complete golf course. The only possible comparison is the value of the level land for residential purposes, and this is the test adopted by Lord Shand in the latter case.

The argument of the appellants that they should be compensated for the engine and cost of piping and arranging for city water may be well met by the cost of this acquisition of other land, for none of these may be necessary under the altered conditions. Any such new lay-out is bound to bring about a different method of dealing with the supply of water, and I cannot believe that, with city water laid down as far as the club property, the appellants would continue to depend upon pumping from the river or the spring. They have already contracted for city water, which, if supplied all round, would render their engine useless. The evidence of the cost of a sewer was, improperly I think, rejected by the arbitrators, who only permitted its cost per foot to be stated. This was 40 and 60 cents for a four-inch and six-inch pipe respectively. This item should be allowed; and, as the club-house is distant 265 feet from the track, there should be an allowance of \$159 for the sewer cost and the cesspit, the value of which was not proved, and which, not being a proper septic tank, is out of date. The cost of laying water mains through the club grounds is not a proper item of damage.

The remaining items of damage claimed are: first, cost of reconstructing the golf links; second, damage to club-house from smoke, noise, and vibration, or, in the alternative, the cost of moving the club-house.

Upon the first item, if additional land is to be secured on the level, and the 20 acres of flat land used, the scale of damages as stated by the golf experts for the cost of rearranging the holes forms a basis for the amount to be allowed. The appellants' golf expert puts this at \$2,640, and the respondents' at \$1,857.50. The fair amount, if 15 new acres have to be prepared, would be, according to the former, \$1,350, while the new and rearranged tees and greens appear from both estimates to run about \$100 a piece. The arbitrators have allowed \$1,000, and this should be increased to \$1,650, including an allowance for three new greens and tees.

The damage to the club-house is stated by the appellants to be so serious as to compel its removal, and in this their golf expert agrees. But its present site is 74 feet above the railway tracks, and is about 263 feet distant from them. The arbitrators, having the advantage of a view of the property, have not thought removal necessary, and have allowed as damages \$1,250. Upon the conflicting evidence, it is, I think, impossible to say that the award is wrong upon either point, although the amount seems small.

The result is, that the award should be increased from \$7,240 to \$18,059, made up as follows:—

Amount required for acquisition of additional acreage to make up for that taken and rendered useless for the purposes of the club.....	\$15,000
Sewer piping, etc., taken and rendered useless.....	159
Reconstructing and providing tees and greens.....	1,650
Damage to club-house	1,250
	<hr/>
	\$18,059

No costs of the appeal should be given, in view of the fact that direct evidence upon what I conceive to be the proper basis for compensation was not given, and that success is divided.

Appeal allowed in part without costs.

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[APPELLATE DIVISION.]

Nov. 13.

RE MUIR AND LAKE ERIE AND NORTHERN R.W. CO.

Railway—Expropriation of Land—Residential Property—Value—Evidence—Sale of Neighbouring Property for Subdivision—Taking Strip of Land on River Front—Deprivation of Access to River—Award—Appeal—Jurisdiction of Court—Increase in Amount Awarded.

The claimant owned 14 acres of land, about two miles from a city; the land bordered on a river; and the appellant had built upon the property a dwelling-house at a cost of \$18,000. The railway company took $1\frac{6}{10}$ acres, extending across the whole of the river front:—

Held, upon appeal from an award of compensation made by arbitrators under the Railway Act of Canada, that, the only reliable evidence of the selling value of the property being testimony shewing the recent sale of a neighbouring property to a syndicate for subdivision purposes, the price per acre paid upon that sale should be adopted as the value of the land taken.

Falconer v. The Queen (1859), 2 Can. Ex. C.R. 82, followed.

2. That the obstruction of the claimant's right of access to the river was a proper and important subject of compensation; the damage was to the whole of the property as such, used as it was, and as an entire block, of which a part was taken.

The Queen v. Buffalo and Lake Huron R.W. Co. (1864), 23 U.C.R. 208, and *The Queen v. Carrier* (1888), 2 Can. Ex. C.R. 36, followed.

3. That for the loss of access to the river, the loss of the attractive feature of a river front, and the loss of a spring interfered with by the railway, 10 per cent. of the value of the house and land was a reasonable sum to allow.

4. That it was competent for the Court, apart from the jurisdiction given by the Railway Act, to act upon its own view of the evidence in dealing with the amounts allowed by the arbitrators.

Re Macpherson and City of Toronto (1895), 26 O.R. 558, approved and followed.

The amount of the award was increased from \$4,250 to \$6,897.50.

APPEAL by Muir, the land-owner and claimant, from an award of arbitrators, under the Railway Act of Canada, fixing at \$4,250 the amount to be paid to the appellant by the railway company as compensation for a part of his land taken for the railway and for the injurious affection of the remainder.

October 2 and 6. The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A.

G. Lynch-Staunton, K.C., for the appellant, argued that the arbitrators had not awarded proper damages for the obstruction of access to the water-front, which is a proper and important subject of compensation: *The Queen v. Buffalo and Lake Huron*

R.W. Co. (1864), 23 U.C.R. 208. They also failed to make due allowance for the timber taken, which they had apparently valued as material for fence-posts only; and for interference with the spring on the property.

W. S. Brewster, K.C., for the respondents, argued that no evidence had been given, and no reason shewn, leading to the conclusion that the arbitrators had erred in their estimates, which were based on sales of similar property made about the same time. The spring to which reference had been made was not used by the appellant.

November 13. The judgment of the Court was delivered by *HODGINS, J.A.*:—Since the notice of expropriation was served, that date being the 31st May, 1913, the respondents abandoned, on the 12th December, 1913, a small piece of land, sufficient, according to their engineer, to enable a ram with dam and feed-box to be put on the appellant's property. This piece is excepted in the award, and no point was raised about it, and no addition can be made in respect of it.

The award and the reasons supplied by the arbitrators disclose that the amounts awarded were:—

1. For $1\frac{6.5}{100}$ acres taken, extending across the whole of the river front of the property, at \$1,500 per acre, including trees	\$2,475
2. Damage to the remainder caused by the purpose for which the land is expropriated	1,775
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Total	\$4,250

In the first item is included, according to the reasons submitted, the land, the trees, the cutting off of the ends of springs, and the value to the rest of the property of the land taken as the river front thereof. It is to be regretted that the amount of this item is not distributed among the several heads, and the value of the land given separately.

The property has a long frontage on *Ava road* and 348 feet on the river by a depth of about 1,000 feet on the south and 1,300 feet on the north. There is a ravine along the south boun-

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dary containing about $4\frac{1}{4}$ acres, while the level land runs out into two knolls overlooking the river. There is a fine and extensive view from the upland. The bank to the river is steep and wooded, and between the two knolls there extends a ravine for 300 feet on a slope rising in that distance about 86 feet. The plan of subdivision into small lots was given up before us, and it was contended that a division into several villa lots was the preferable method if it were being sold in lots.

There is a rather unusual difference in the evidence in regard to the values placed on the river lots, 2, 3, and 4, as shewn on the subdivision plan, which include the south ravine, the knolls, and the small ravine between them, one witness stating that they were worth before the expropriation \$10,500, and another that their value was \$150. The appellant put their value at \$17,300 before and \$2,000 after expropriation.

The value of the whole property is variously given. The appellant's house cost \$18,000, while the respondents' witnesses valued it at \$12,000. The latter treated the $13\frac{1}{2}$ acres as worth only \$6,000 or \$7,000, while those of the appellant went as high as \$43,000 to \$46,000. The evidence of these expert witnesses is, to my mind, unsatisfactory. Those called for the appellant displayed no knowledge of actual sales, and depended on inquiries as to properties, none of which were stated to be in any way similar in position or value to the one in question. The respondents' evidence of this class is open to criticism in the same direction, and its weight is much weakened by statements such as that of Pitcher, that he had not looked over the river front to value it, and of Bullock, that he placed no value on the river front, and that he would not build on the property on the river because it was further away from access to the city, the difference being only about the 300 feet measured from Ava road.

The property lies $2\frac{1}{4}$ miles west of the Brantford market-place, and Mr. Schultz owns the adjoining land, $13\frac{1}{2}$ acres to the west. Beyond this is the golf club. East of the appellant and towards Brantford are the VanWestrum property, 14 acres, the Stratford property, 41 acres, and the Woodyatt property, 20 acres. Comparison with these lands is reasonable, and the

sale of the Woodyatt 20 acres in April, 1914, for \$21,000, to a syndicate for subdivision purposes, is really the only reliable evidence of selling value. See *Falconer v. The Queen* (1889), 2 Can. Ex. C.R. 82. Based on this, the appellant's acreage would give \$14,205, which, added to the cost of the house, would total \$32,205. The evidence is conflicting as to whether values remained stationary, but there is nothing to shew that on the 31st May, 1913, the property was worth less per acre than the Woodyatt property. Bullock, called for the respondents, says that there was greater activity in the last three years; and Fair, another of the respondents' witnesses, says that subdivisions were not selling this year as well as in previous years.

If, therefore, \$1,050 per acre is taken throughout as the fair value of the property as a whole for the purposes of the appellant's residence, and its amenities, apart from its speculative value subdivided, the $1\frac{65}{100}$ acres taken would represent \$1,732, leaving \$743 for the trees, springs, and the damage to the remainder of the property by loss of access to the river front.

It may be that this is not the division of the amount intended by the arbitrators. But they have not in their reasons indicated upon what basis they proceeded; and, if the valuation of \$1,050 per acre is reasonable, then, in my judgment, the remaining amount is a quite inadequate damage for loss of access to the river. It is true, no doubt, that to make a good road or path to the water's edge and to build a boat-house would cost the owner a considerable sum of money. But this added cost would be represented by tangible improvements.

The appellant had, in the language of Lord Kingsdown in *Miner v. Gilmour* (1858), 12 Moore P.C. 131, 156, where the river was non-navigable, the "right to what may be called the ordinary use of the water flowing past his land; for instance, to the reasonable use of the water for his domestic purposes and for his cattle. . . . But, further, he has the right to the use of it for any purpose, or what may be deemed the extraordinary use of it, provided he does not thereby interfere with the rights of other proprietors, either above or below him." This language is quoted with approval in *North Shore R.W. Co. v. Pion* (1889), 14 App. Cas. 612, and the right spoken of is treated in *Chasemore v.*

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Richards (1859), 7 H.L.C. 349, and *Lyon v. Fishmongers Co.* (1876), 1 App. Cas. 662, 683, as “a natural incident to the right to the soil itself,” i.e., the soil of the adjoining lands.

That the obstruction of the right of access is a proper and important subject of compensation cannot be doubted: *The Queen v. Buffalo and Lake Huron R.W. Co.*, 23 U.C.R. 208.

The damage is, I think, to the whole of the property as such, used as it is, and as an entire block; and there seems no good reason to doubt that access by the smaller ravine and to houses built to the south overlooking the longer ravine by a way constructed down and through it, might be advantageously had. The principle stated by Mr. Justice Burbidge in *The Queen v. Carrier* (1888), 2 Can. Ex. C.R. 36, 45, that an owner is “not bound to sell, and may reasonably prefer to keep his property for the purposes of his business, and in that case should be indemnified for any depreciation in its value to him for the purposes for which he had been accustomed, and still desires, to use it,” is as applicable to the expropriation of part of the property as to the whole.

The cutting off of the whole river front in addition to loss of its possible commercial and domestic value reduces the whole 14 acres from the position of an attractive and unusual property to that of a level lot just as uninteresting as any to be found anywhere on the outskirts of any city.

The estimates of damage to the lots 2, 3, and 4, overlooking the river, made by some of the witnesses and by the appellant, are, I think, excessive, and it is not easy to arrive at a proper percentage in settling the detriment suffered. The estimates vary from 7 per cent. to 25 per cent., and the distant view has not in fact been interfered with. But, whatever basis may be adopted, it is clear that the arbitrators have not viewed it in the light of its advantage to a property of the nature and kind in question as used by the appellant. He is entitled to be compensated on the basis of the value to *him*, and not the expropriators. The only explanation of their figures is, that they have treated it upon the footing of a property incapable of useful subdivision, or as one which, though equipped with a good resi-

dence, approximates rather to a farm than a villa property. In so doing I think the arbitrators have erred in their application of the principles underlying the question of injurious affection, and have deprived the appellant of an advantage to which he is fairly entitled. See on this point *Paint v. The Queen* (1890), 2 Can. Ex. C.R. 149.

It was argued that the Railway Board had made an order for a crossing, and that the appellant was not wholly deprived of access. A glance at the order put in shews that that answer is quite inadequate, even if the physical conditions as described by the respondents' witnesses did not preclude a proper landing for the suggested structure.

Viewing the value of the house and land as \$32,205, and applying what, I think, is the proper principle, it does not seem unreasonable to allow upon the whole evidence 10 per cent. or \$3,220.50, having regard to and including the loss of access and the attractiveness of a river front with all its beauty and possibilities of use, including the spring interfered with.

The evidence as to the trees is as discordant as that regarding the value of the property. The appellant claims that from 700 to 1,000 trees were destroyed, and there is evidence that some of them were of a girth of 18 to 30 inches. The respondents' witnesses only allow from 156 to 170, and the arbitrators have allowed something in their award for this head of damage. But, as the amount they have allowed is not enough, as I have indicated, to cover depreciation for cutting off the access to the river, it is necessary to arrive at a proper conclusion as to the trees themselves. The amount allowed for them by the respondents' witnesses, \$75.20, even on 156 or 170 trees, is manifestly too small, being based on fence post value. Viewed as an enhancement to the beauty of the property, which is said to have been park-like and well wooded, they are worth much more than 10 or 20 cents a tree. Taking the most conservative view, I think the amount spoken of, \$75.20, should be increased to at least \$170.

The arbitrators have allowed \$1,775 as depreciation for vibration, smoke, and noise. No evidence was given upon this

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head specifically, except as included in general terms of the whole damage to the property, and it is not possible to disturb the award on this point.

In the award itself it is stated that the arbitrators gained no information by their view on which they relied in making the award. Following the view of Street, J., in *Re Macpherson and City of Toronto* (1895), 26 O.R. 558, it is competent for the Court, apart from the jurisdiction given by the Railway Act, to act upon its own view of the evidence in dealing with the figures arrived at by the arbitrators.

The result is, that the award should be varied as follows:—

Allowance for land taken.....	\$1,732.00
For damage by cutting off access to river...	3,220.50
For trees cut	170.00
For depreciation due to use of lands taken..	1,775.00
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Total.....	\$6,897.50

As the appellant substantially succeeds upon the points raised before us, he should have his costs of the appeal.

Appeal allowed.

[APPELLATE DIVISION.]

1914

CAMPBELL v. BARRETT AND McCORMACK.

May 13.
Nov. 13.

Vendor and Purchaser—Agreement for Sale of Land outside of Province—Assignment of Interest by Vendor after Agreement—Notice—Obligation of Assignee to Convey to Purchaser—Specific Performance—Payments Made by Purchaser before and after Assignment—Agreement between Vendor and Assignee, Nature of—Costs—Form of Judgment.

In May, 1912, the owners of land in the Province of Saskatchewan agreed to sell it to the defendant M. The land was divided into lots. The payments were to be completed on or before the 2nd November, 1913; the vendors agreeing "to give title to one or more lots at a time, on payment of the proportionate balance due, said amount to be credited on the last payment." In October, 1912, five of the lots were sold by M. to the plaintiff; the price to be paid in instalments. In April, 1913, M. assigned his interest to the defendant B., and M.'s vendors agreed to recognise and acknowledge this assignment, on the terms of B. guaranteeing to make the payments still outstanding. The plaintiff completed his payments, dealing with M. alone, in good faith, and, as to the payments made after the assignment to B., with B.'s knowledge and consent. M.'s assignment included his interest in the lots bought by the plaintiff, and B. had previous notice of the sale to the plaintiff. There was a dispute between M. and B. as to the nature of the agreement between them:—*Held*, that, whether B. was absolute owner or mortgagee with notice of the prior sales, he had acquired, in either capacity, an interest that was subject to an obligation known to him which bound him to carry out that obligation.

Greaves v. Tofield (1880), 14 Ch.D. 563, and *Taylor v. Stibbert* (1794). 2 Ves. Jr. 437, followed.

Held, therefore, that the defendant B. was bound to give the plaintiff the title he stipulated for; and the plaintiff was entitled to a judgment, in the usual form, with a reference as to title, reserving further directions, against both defendants, for specific performance, although the land was situate out of the Province.

Montgomery v. Ruppensburg (1899), 31 O.R. 433, approved and followed.

Held, also, that the judgment should be with costs against both defendants, without prejudice, in the taking of the accounts as between them, to the incidence of these costs.

As to the liability of B. for the money paid by the plaintiff before the assignment to B., no opinion expressed.

Judgment of LENNOX, J., affirmed, with a variance as to the form.

ACTION for specific performance of an agreement for the sale to the plaintiff of five lots in a subdivision of land in the Province of Saskatchewan, or for alternative relief.

By a written agreement dated the 2nd May, 1912, the then owners of the subdivision, Moss and Burgess, agreed to sell it to the defendant McCormack for \$21,930. The payments thereon were to be completed on or before the 2nd November, 1913; the vendors agreeing to give title to one or more of the lots, on

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payment of "the proportionate balance due, said amount to be credited on the last payment."

Five of the lots (the five in question) were sold by the defendant McCormack to the plaintiff on the 23rd October, 1912, for \$1,500, payable in instalments.

On the 29th April, 1913, the defendant McCormack assigned his interest in the whole of the land to the defendant Barrett; and Moss and Burgess agreed to recognise and acknowledge this assignment, on the terms of the defendant Barrett guaranteeing the payments still outstanding.

The plaintiff completed his payments, dealing with the defendant McCormack only, and asked for a conveyance of his five lots. Failing to get it, he brought this action against both Barrett and McCormack.

April 17 and 18. The action was tried by LENNOX, J., without a jury, at Ottawa.

W. B. Lawson, K.C., for the plaintiff.

W. N. Tilley, for the defendant Barrett.

R. A. Pringle, K.C., for the defendant McCormack.

May 13. LENNOX, J.:—The issues of fact in this action arise out of a conflict of evidence between the defendants. But there is an issue in law between the plaintiff and the defendant Barrett, not dealt with in the argument of counsel, namely, whether the plaintiff is not entitled to substantially the relief claimed, even if the facts are as set up by the defendant Barrett.

I think he is. It is admitted on all hands that the plaintiff has paid his purchase-money in full, and, as against McCormack at all events, has done everything to entitle him to a conveyance; that at the time negotiations were opened up between the defendants only \$500 of this purchase-money had been paid, and the balance, \$1,000, was paid afterwards; that at this time a statement was prepared and submitted, and subsequently delivered to the defendant Barrett, shewing all sales made by McCormack, including the sale of the five lots in question to the plaintiff, the amounts paid by each purchaser, his post-office address, the pay-

ments accruing due by each purchaser, including the plaintiff, and the dates at which the said several payments would become due; that at this time it was arranged and agreed between the defendants that the defendant Barrett would assume and take the entire direction and control of his co-defendant's business and affairs, even to the extent of having the right to require McCormack to sell his automobile and the furniture of his office, adopt a reduced scale of expenditure, and do his banking in the joint names of the defendants; and this was done. It is admitted on all hands, too, that, as profit or consideration to Barrett for coming in, Barrett would not only have the entire receipts to the extent of \$250 each from the sale of the seventy-seven lots then remaining unsold, but would receive an absolute conveyance of McCormack's interest in twenty-seven other lots, upon which \$1,800 had been paid; and that, notwithstanding the assignment to Barrett of the seventy-seven lots to be sold and the fifty-two lots under purchase, including the plaintiff's lots, the dealings between the defendants were to be kept secret, and the defendant McCormack was to go on dealing with the fifty-two purchasers, including the plaintiff, and get in the purchase-money as if no transaction had been effected between the defendants; and this was done, and part at least of the purchase-money subsequently paid by the plaintiff was applied in reduction of Barrett's liability to Mr. Kuntz and to increase the margin of value in the property he held and holds in Montreal under conveyance from McCormack.

A great many authorities have been cited, but none upon this specific question, and I need none to convince me that, upon these admitted facts, the plaintiff, having paid in full with the concurrence of Barrett, as he otherwise would not have paid, is entitled to his deed.

But it is proper that I should deal with the issues of fact as well. Both defendants are speculators and dealers in western land. The defendant Barrett is a dealer in fuel and lumber as well—if that makes any difference. I am satisfied that McCormack's object in entering into the arrangement with Barrett was, as he states, to protect the fifty-two men to whom he had sold lots—to secure deeds at once for those who had already

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paid up and for the others when they paid in full—and to this end he was willing to sacrifice the thousands he had paid on the Alta Vista lots. Part of the latter part of his cross-examination was unsatisfactory; he fenced quite unnecessarily; but I am far from believing that what he said, even then, was untrue. As to almost all the main points in dispute he is distinctly corroborated by Colin E. Smith, an intelligent, straightforward witness, whose evidence I feel no hesitation in accepting. On the other hand, I can only believe that the defendant Barrett was candid, upon the assumption that he has a very bad memory, and that many of his statements are attributable to this.

This was only one of a long series of land deals between the defendants, all of which appear to have been profitable to Barrett. Contrary to his very often repeated declaration that he entered into this transaction from motives of benevolence or philanthropy, I come to the conclusion that he entered into it for gain; and it promised substantial gain at the time. I find that the bargain was, that he was to get McCormack's interest in the twenty-seven park lots and \$250 out of each of the seventy-seven lots when sold, and McCormack's assistance in selling, as consideration for enabling McCormack to protect the purchasers of the fifty-two lots already sold, and was to deliver or procure conveyances to these purchasers when they paid in full, and for a few of them who had paid in full, right away; and that McCormack was to receive the balances of purchase-money on the fifty-two lots without account. There was no agreement to pay the \$150 per lot for titles, as now claimed by this defendant.

I find that he arranged for the letters to Moss and Burgess, and read and approved of them before they were mailed. It matters not, then, it seems to me, to ascertain the exact status, by name, of these defendants in relation to each other. Partners they might well be regarded as, for they were entering into a joint adventure, with a joint bank account, with profits apportioned to each, and with defined rights and supervision for each of them; each was bound by the other, within the scope of the undertaking, whether each proved faithful or not—or whether the relation was that of principal and agent, with the defendant Barrett, as he claims, in supreme control. The name

does not matter. Take it any way you like, the defendant Barrett, with full knowledge of the plaintiff's position and rights at the time, apprised of the payments to be made and of their dates, and arranging for and facilitating their payment to his co-defendant without notice to the plaintiff, cannot escape the burden of the trust thrown upon him, and he must execute it. True, he did not get the whole of the purchase-money, but he took an assignment of the plaintiff's lots, and unjustly demands from him a further payment of \$750.

Upon the facts then as well—the transactions between the defendants—the plaintiff is entitled to a conveyance as against both defendants.

It is idle to weigh the question as to my jurisdiction to order specific performance. The defendants have not got in the title, nor have their vendors. Judgment for specific performance would be useless.

There will be judgment against the defendants for \$1,500 with costs; a stay of execution for sixty days; and, if the land is conveyed or transferred according to the law of Saskatchewan within this time, it will go in satisfaction of \$1,500 of the judgment.

The judgment as drawn up and entered adjudged that the plaintiff should recover against the defendants the sum of \$1,500; that the defendants should pay to the plaintiff his costs of the action; that if, within sixty days from the date of the judgment, a good title should be acquired by the defendants to the lands in question in the action, and a conveyance or transfer thereof in accordance with the laws of the Province of Saskatchewan should be delivered by the defendants to the plaintiff, the same should be taken in satisfaction of the judgment against the defendants for \$1,500, and the plaintiff should, after such conveyance and transfer made to him, recover his costs only; and that there should be no costs as between the defendants.

The defendant Barrett appealed from the judgment of LENNOX, J.

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September 28. The appeal was heard by MEREDITH C.J.O., MAGEE and HODGINS, JJ.A., and BRITTON, J.

W. N. Tilley, for the appellant. The findings of fact of the learned trial Judge are not all justified by the evidence. It may be conceded that, if the evidence established a contract between the appellant and the respondent McCormack, enforceable for the benefit of the plaintiff, the plaintiff's rights might, in order to avoid circuitry, be worked out in this action. But McCormack had no enforceable contract with the appellant. The Statute of Frauds is pleaded and is a complete defence. The fact that the lands are outside of Ontario is immaterial: *Leroux v. Brown* (1852), 12 C.B. 801; *In re Hoyle*, [1893] 1 Ch. 84, at p. 97. The Imperial Act 29 Car. II. ch. 3, sec. 4, is in force in Saskatchewan, and governs, even if the law of that Province is to be applied. The plaintiff has not shewn that the law of Saskatchewan differs on any point material to this case from the law of Ontario: Halsbury's Laws of England, vol. 13, p. 488. No trust was created in favour of the plaintiff. Even if McCormack's story is believed, his contract with the appellant was not to secure a benefit to the plaintiff so as to constitute the latter a *cestui que trust* thereunder. The plaintiff was still to deal directly with McCormack, who was to receive the balance of the purchase-money, and procure and give a conveyance to the plaintiff. The appellant was not to deal directly with the plaintiff. See *Gandy v. Gandy* (1885), 30 Ch.D. 57, 67, 68. The plaintiff assumes that, when the appellant took the assignment of the contract covering 129 lots, the plaintiff had a prior equitable title to five of them. But the plaintiff had in fact merely a contract with McCormack, which was unenforceable because McCormack could not make title. But, even if the plaintiff did acquire a prior equitable title, it was subject to the prior claim of Moss and Burgess; and that was the only title McCormack could give. See *Cave v. Cave* (1880), 15 Ch.D. 639, at p. 647. The plaintiff, to acquire a status, must pay up the whole of the appellant's purchase-money and take his position; while his action is to enforce delivery by the appellant of a clear title without any payment—a claim entirely inconsistent with his true position: *Rose v. Watson* (1864), 10 H.L.C. 672; *Whitebread &*

Co. Limited v. Watt, [1902] 1 Ch. 835; *Ridout v. Fowler*, [1904] 1 Ch. 658; *McKillop & Benjafield v. Alexander* (1912), 45 S.C.R. 551; *Shaw v. Foster* (1872), L.R. 5 H.L. 321; *Cory v. Eyre* (1863), 1 DeG. J. & S. 149, at p. 167. When the plaintiff seeks equity, the Court will not disregard the fact that he was guilty of gross negligence in not examining into McCormack's title before entering into the agreement: *Brown v. McLean* (1889), 18 O.R. 533, at p. 537; *Abell v. Morrison* (1890), 19 O.R. 669; *McLeod v. Wadland* (1894), 25 O.R. 118. The appellant was guilty of no negligence. The appellant should not have been adjudged liable to repay to the plaintiff moneys paid by the plaintiff to McCormack long before the appellant ever heard of these lands. The plaintiff never put himself in a position to assert that his contract was broken. He never tendered a conveyance, and he did not pay the taxes.

J. A. Macintosh, for the plaintiff, respondent. The findings of fact of the trial Judge are amply supported by the evidence, and should be sustained. By the contract between McCormack and the appellant, the latter became the purchaser of the whole of the land, with knowledge of the plaintiff's previous contract with McCormack for the purchase of a portion free from incumbrances; and the legal effect of this was to make the appellant liable to perform McCormack's contract with the plaintiff: *Fry on Specific Performance*, 5th ed. (Can.), pp. 94, 112, *et seq.*; *Daniels v. Davison* (1811), 17 Ves. 433; *Holmes v. Powell* (1856), 8 DeG. M. & G. 572; *Flinn v. Pountain* (1889), 37 W.R. 443; *Strathy v. Stephens* (1913), 29 O.L.R. 383. The Statute of Frauds is not available to the appellant: *Halsbury's Laws of England*, vol. 27, p. 28 *et seq.*; *In re Duke of Marlborough*, [1894] 2 Ch. 133; *Rochefoucauld v. Boustead*, [1897] 1 Ch. 196; *Haigh v. Kaye* (1872), L.R. 7 Ch. 469. Apart from the legal effect of the appellant purchasing with knowledge of the plaintiff's contract, the plaintiff relies upon the express contract between McCormack and the appellant, as found by the trial Judge, viz., that the appellant was to give title to McCormack's purchasers; and the plaintiff is entitled to enforce that contract, bringing himself within an exception to the rule that a person who is not a party to a contract cannot enforce it; because, by

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the contract between McCormack and the appellant, the latter became a trustee for the plaintiff of the title to the lots purchased by the plaintiff: Halsbury's Laws of England, vol. 7, p. 344; *Gandy v. Gandy*, 30 Ch.D. 57; *Gregory v. Williams* (1817), 3 Mer. 582; *In re Flavell* (1883), 25 Ch.D. 89. Even if it should be held that the plaintiff had not, for want of privity, the right to enforce the contract, the Court, having all parties before it, would permit the plaintiff and McCormack to join together for the purpose of enforcing the contract. In the circumstances of the case, the appellant is not entitled to take the place of the original vendors, Moss and Burgess, or to be subrogated to the rights of Moss and Burgess, so far as the plaintiff is concerned.

R. A. Pringle, K.C., for the defendant McCormack, respondent, supported the judgment of LENNOX J., upon the evidence.

November 13. The judgment of the Court was delivered by HODGINS, J.A.:—There is a judgment against the appellant for \$1,500 and costs, upon the basis, as I understand it, that, having taken an assignment of the respondent McCormack's interest in the lots sold by him to the respondent plaintiff, he (the appellant) became, upon payment for them in full, a trustee for the latter, and is not able or willing to perform the trust.

The facts are not complicated. Moss and Burgess agreed, by written agreement dated the 2nd May, 1912, to sell to McCormack the lots in part of a legal subdivision in Saskatchewan known as Alta Vista, for \$21,930. The payments on this agreement were to be completed on or before the 2nd November, 1913; the vendors agreeing "to give title to one or more lots at a time, on payment of the proportionate balance due, said amount to be credited on the last payment," i.e., the one due on the 2nd November, 1913.

Five of the lots were sold by McCormack to the plaintiff on the 23rd October, 1912, for \$1,500, payable in instalments. On the 29th April, 1913, McCormack assigned his right, title, and interest in the lands and premises described in the Moss and Burgess agreement to the appellant, and they, the vendors, agreed to recognise and acknowledge this assignment, on the

terms of the appellant guaranteeing to make the payments still outstanding.

The plaintiff completed his payments, dealing with McCormack solely, and asked for a deed, which he has been unable to get; and the question upon this appeal is, whether, upon that failure, he is entitled to specific performance or to get back from the appellant what he has paid to McCormack. The plaintiff, in making these payments, dealt with McCormack in good faith, and, as to those made after the assignment to the appellant, with the latter's knowledge and consent. This consent is made clear in the examination and cross-examination of the appellant. There was \$3,416 still outstanding on the fifty-two lots which McCormack had already sold under agreements, and this sum included the amounts still to be paid by the plaintiff. The appellant's final statements are given thus: "Q. It was not your business to notify these people who owed this \$3,416, because the money according to the agreement was to go to McCormack? A. McCormack was to collect it and bring it to me. . . . Q. Then it was McCormack's money to collect? A. Yes, part of his business."

McCormack's assignment included his interest in the lots bought by the plaintiff, and the appellant had previous notice of the sale to the plaintiff and of the amount paid by him. He thereupon held the lands sold to the plaintiff, so far as McCormack could convey them, subject to the obligation to convey them to the plaintiff upon completion of the plaintiff's future payments therefor, which under ordinary circumstances the appellant would have received.

The evidence of the appellant shews assent to McCormack's receipt of the moneys, and McCormack became thereby his agent for the purpose of the acceptance of performance by the plaintiff of the contract, with or without a liability to account to the appellant. This clearly estops him from denying that the plaintiff has effectively performed his contract by paying what was stipulated for therein. He cannot require further payment from the plaintiff in respect to that contract. Nor can he hold what he acquired, free from the correlative obligation, the extent of which is measured not by what he originally got, but by what

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the plaintiff is entitled to receive under his contract, so far as that may be vested in the appellant, or is what he is legally entitled to get in under the contract with Moss and Burgess, at the time he is called on to fulfil the plaintiff's contract. While he cannot be asked to convey until payment in full is made, the right to receive that payment existed, after the assignment, in him alone. As between him and McCormack, the extent of his liability to the latter will of course depend upon their agreement.

There is a distinct contradiction between the appellant and McCormack as to what that agreement was. It was argued on behalf of the former that it was a loan upon certain securities to secure him against payments he agreed to make, while the latter asserts it to be a sale out and out. In the view I take, it is not necessary to examine with precision the situation created by the transaction into which these parties entered. The learned trial Judge accepts McCormack's story. To reverse his finding this Court should be clear upon the evidence that he is mistaken. But the documents and the actions of the appellant make in favour of the judgment in appeal. The assignment of the agreement to the appellant is absolute in form. It is, with his assent, made subject to his obligation to the vendors to pay the amounts yet outstanding. This is an unusual bargain for a mere mortgagee. Then in the letters of the appellant to the vendors he assumes the position of owner, and asks that a new agreement should be made with him by the vendors, replacing the assignment: also an unusual position for a mortgagee to take. The instalments still to mature he at once arranges to pay, and does pay, and endeavours to set off a debt to himself by one of the vendors on another transaction against the last instalment on the McCormack agreement. He also gives full title to two parties whose deeds were required.

As against these matters he sets up an arrangement under which he is to get \$150 a lot on the whole one hundred and twenty-nine lots before making title, although fifty-two of them were sold prior to his assignment, and notwithstanding his agreement that McCormack should retain the amount already

paid on these lots and the moneys still maturing on them, thus giving up \$3,426 in money against a mere unsecured promise of McCormack to pay the \$150 on these lots, and although the amount which the latter would receive on them would only amount to \$65 per lot, while the remainder of the \$150 would have to be raised on the remaining seventy-seven lots. The pleading of the appellant sets up absolute ownership, coupled with a willingness to transfer the lots on payment of \$150 a lot. McCormack's statement is that there was a distinct agreement for valuable consideration with the appellant, that the latter would take over his agreement with his vendors upon the understanding that the appellant would "go good" for the delivery of the title to McCormack's purchasers of the fifty-two Alta Vista lots then sold. The consideration was, that the appellant would get the benefit of the \$7,300 theretofore paid by McCormack to his vendors, and that, in addition, McCormack would transfer to him his equity in twenty-seven Brevoort Park lots, upon which McCormack had paid \$1,800, and would also use his best endeavours to sell the remaining seventy-seven Alta Vista lots, for the appellant's benefit, at \$250 a lot.

It would be difficult, it seems to me, to reverse the trial Judge's finding of fact, in face of the actions of the appellant. But, in addition to that, if the latter's argument before us was adopted, the position of the owners of the fifty-two lots would be this: if they sued for specific performance, they would be met with the fact that they could not succeed against McCormack because he had parted with all his interest and could not convey if he would, while as against the appellant they would be met with the assertion that he was not as assignee bound to convey, because he had only agreed to do so when \$150 per lot had been paid by McCormack, and that the plaintiff was bound to perform that agreement, as well as the one that he made with McCormack, which he had allowed the plaintiff to perform to the extent of paying \$1,000 to McCormack without any warning of the change of position and the new agreement.

But the true status of the appellant, whether as absolute owner or as mortgagee with notice of the prior sales, is, that he

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has acquired, in either capacity, an interest that was subject to an obligation known to him which binds him to carry out that obligation.

There is a very clear statement of the law given by Bramwell, L.J., in *Greaves v. Tofield* (1880), 14 Ch. D. 563, at p. 577, thus: "If a man having an estate agrees to sell it, or undertakes to grant an interest in it, or a charge upon it, for a valuable consideration, and afterwards, disregarding the bargain he has made, conveys to a third person, or so deals with it by bargain with a third person, that he is incompetent to convey the estate or grant the interest to the first which he had agreed to do, and the third person has all along had notice of the first contract, the conscience of the second purchaser is affected, and he cannot retain the estate without giving the person who entered into the first contract that right in it for which he had stipulated, and if necessary he must join in a conveyance of the estate if the first person was a purchaser, or he must join in executing a charge if it was a charge that was to be executed, or a lease if it was a lease to be granted."

In *Taylor v. Stibbert* (1794), 2 Ves. Jr. 437, Lord Loughborough, L.C., speaking of a subsequent purchaser with notice, stated the law in similar language (p. 439): "He is liable to the same equity, stands in his place, and is bound to do that which the person he represents would be bound to do by the decree." And again: "He is either not bound at all or if as standing in the place of Wood" (the original vendor), "the engagement can be neither greater nor less than that of the person he represents."

The cases of *Daniels v. Davison*, 17 Ves. 433, *Mumford v. Stohwasser* (1874), L.R. 18 Eq. 556, *Savereux v. Tourangeau* (1908), 16 O.L.R. 600, and *Strathy v. Stephens* (1913), 29 O.L.R. 383, point to the same result. And in *Potter v. Sanders* (1846), 6 Hare 1, the subsequent purchaser, Coates, was ordered to convey, notwithstanding that he had paid his purchase-money to the vendor in full.

The appellant has apparently paid off the original vendors. But, if he has not, he is bound to give this plaintiff the title he stipulated for. There is no reason why there should not be the

usual judgment for specific performance, although the lands are situate out of the Province: *Montgomery v. Ruppensburg* (1899), 31 O.R. 433. If the defendants do not make title, the judgment on further directions will probably give relief similar to that provided by the present judgment. I express no opinion as to how far the appellant would be liable for the money paid on the plaintiff's contract before the assignment to the appellant. The judgment should be with costs against both defendants, without prejudice, in the taking of the accounts as between them, as to the incidence of these costs. The variation in the judgment is one of form, not of substance, and the appellant should pay the costs of both respondents in this Court. Reference to the Master at Cornwall. Further directions and costs reserved until after the Master shall have made his report.

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Judgment of LENNOX, J., varied.

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Covenant—Restraint of Trade—Undertaking not to Enter into Competition with Established Business—Business Carried on under Management of Covenantor — Breach of Covenant — Interim Injunction — Scope and Form of—Appeal—Costs.

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The defendant, who had been employed as a manager in the plaintiffs' business of dyeing and cleaning, when leaving their employment, entered into an agreement with them, whereby, for a recited consideration, she covenanted with them that she would not "either alone or jointly with or as agent or otherwise for any other person, firm, or company, directly or indirectly enter into competition with or opposition to the business of" the plaintiffs "within the Province of Ontario for a period of three years from the date of this agreement." Shortly after the making of this agreement, a business which admittedly competed with the business of the plaintiffs was commenced and carried on in the city of Toronto ostensibly by a daughter of the defendant, and the business was advertised to the public as under the management of the defendant:—

Held, affirming the decision of LATCHFORD, J., upon a motion for an interim injunction, that the evidence before the Court warranted the conclusion that the business was being carried on under the management of the defendant; and that constituted a breach of her covenant.

The order of LATCHFORD, J., restrained the defendant until the trial of the action "from entering into or continuing in business as a dyer and cleaner . . . in the Province of Ontario, and from entering into competition with or opposition to the business carried on by the plaintiffs . . . either alone or jointly with or as agent or otherwise for any other person, firm, or company, directly or indirectly:—"

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Held, that the injunction was properly granted in general terms, without specifying the acts from the doing which it was intended that it should restrain the defendant.

Earl Dysart v. Hammerton & Co., [1914] 1 Ch. 822, followed.

Held, however, that the order was too wide, and the first part, which restrained the defendant "from entering into or continuing in business as a dyer and cleaner," should be struck out.

Held, also, HODGINS, J.A., dissenting, that the defendant should pay the costs of her appeal.

Per HODGINS, J.A.:—It is open to question whether the covenant is broken by the defendant engaging as manager in a business which itself competes with that of the plaintiffs. Does she herself compete, or is it the business, which she does not carry on, which itself competes, with the plaintiffs' undertaking? The plaintiffs should undertake to bring the action to a speedy trial, and the costs of the appeal should abide the result of the trial.

MOTION by the plaintiffs for an order restraining the defendant until the trial of the action from acting as manager of the business of one O. E. Smith, in breach of a covenant entered into with the plaintiffs.

September 16. The motion was heard by LATCHFORD, J., in the Weekly Court at Toronto.

W. R. Cavell, for the plaintiffs.

E. B. Ryckman, K.C., for the defendant.

September 19. LATCHFORD, J.:—The plaintiffs Parkers Dye Works Limited have for many years carried on business as dyers and cleaners in Toronto and the other principal cities of Ontario, and have in all about 400 agencies in the Dominion of Canada. In 1912, they purchased a similar business, theretofore for many years conducted by the defendant under the name of "Smith's Toronto Dye Works." They incorporated the latter business as "Smith's Toronto Dye Works Limited," and retained the defendant in the position of manager.

In June, 1914, an agreement dated the 23rd April, 1914, was made between the plaintiff companies and the defendant whereby Mrs. Smith, in consideration of \$1,000, assigned to the Parker company her claims against the Smith company, acknowledged that she had no further claim against either company, and covenanted that she would not "as agent or otherwise for any person . . . directly or indirectly enter into competition with or opposition to the business" of either company within Ontario for a period of three years from the date of the agreement.

In a Toronto newspaper of the 23rd July, the following advertisement appeared:—

“ ‘Smith’
“French Cleaning, Dyeing and Pressing.
“85 Bloor St. West.
“Under the management of
“Mrs. E. T. Smith.
“’Phone N. 6244.’ ”

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A circular issued about the same time sets forth that “O. E. Smith” has opened a dyeing and cleaning business at the address mentioned “under the management of Mrs. E. T. Smith, formerly of Smith’s Toronto Dye Works, with many years of experience in high class trade.”

The plaintiffs now seek an injunction restraining Mrs. Smith from managing the rival business of O. E. Smith, on the ground that her management of the business at 85 Bloor Street West constitutes a breach of her covenant.

The defendant was examined under oath for the purposes of the motion. Her evidence—to say the least—is not remarkable for its candour. With much reluctance, Mrs. Smith admitted that “O. E. Smith” is her daughter Olive. There was even greater difficulty in obtaining from the defendant an admission that she was acting as manager of the O. E. Smith business. She was asked (Q. 147), “Are you managing the business?” and answered, “I am working for her.” While denying that she knew anything of the advertisement, she acknowledged that the daughter had shewn her the circular. The examination referring to this circular proceeded:—

“148. Q. You told me just now the circular was correct, you know, and that circular says ‘Under the management of Mrs. E. T. Smith?’ A. I said I was doing anything I was told to. She may call me a manager: I don’t know what she calls me.”

There is little difficulty about the reasonableness of the restriction by which the defendant agreed to be bound. As the business of the Parker company extends throughout the whole of Ontario, the restriction does not, in my judgment, afford the company more than fair protection, and the interests of the pub-

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lie are not interfered with. See *Allen Manufacturing Co. v. Murphy* (1910-11), 22 O.L.R. 539 and 23 O.L.R. 467.

The business carried on at 85 Bloor Street West is undoubtedly in competition with or opposition to the business of the plaintiffs. I assume for the purposes of this motion that that business is not a mere cover for a business which is in fact the defendant's. Yet the management of that business by the defendant is, in my opinion, in breach of her covenant that she would not, for the term mentioned, as agent or otherwise for any other person, directly or indirectly enter into competition with or opposition to the business of the plaintiffs.

The covenant in *Gophir Diamond Co. v. Wood*, [1902] 1 Ch. 950, so much relied on by the defendant, frowns on the use of the word "interested" in any connection which meant that the defendant was to have a proprietary or pecuniary interest in the success or failure of the business. No such connection exists in the present case. "Manager" seems to me to fall within the general words "or otherwise" following the word "agent," if, indeed, it is not within the word "agent" itself.

The defendant will, therefore, be enjoined as asked until the trial. Costs in the cause to the plaintiffs unless the trial Judge shall otherwise order.

The defendant appealed from the order of LATCFORD, J.

October 9 and 13. The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A.

E. B. Ryckman, K.C., for the appellant, argued that the covenant did not apply to the defendant in her capacity as a servant in a competitive business. It does not follow that she was an agent of the competing company because she is described as its manager. The following cases were referred to: *Clarke v. Watkins* (1863), 11 W.R. 319; *Gophir Diamond Co. v. Wood*, [1902] 1 Ch. 950, where the covenant was broader than here; *Smith v. Hancock*, [1894] 2 Ch. 377; *Allen v. Taylor* (1870), 19 W.R. 35. [MEREDITH, C.J.O., referred to *Anderson v. Ross* (1907), 14 O.L.R. 683, where the cases cited by the appellant are referred to.] There is no evidence of any competing or op-

CORRECTION.

On p. 172 (in this issue), line 13, for “frowns” read “turns.”

posing action by the defendant. The form of injunction granted is objectionable: see Kerr on Injunctions, 6th ed., p. 662, and cases there cited. The injunction is too broad, and, if continued, should be made specific.

W. R. Cavell, for the plaintiffs, the respondents, argued that the order of the learned trial Judge was correct and should be affirmed. He referred to *Parnell v. Dean* (1900), 31 O.R. 517; *Jones v. Heavens* (1877), 4 Ch. D. 636; *Pearks Limited v. Cul-len* (1912), 28 Times L.R. 371; *Dottridge Brothers (Limited) v. Crook* (1907), 23 Times L.R. 644. The *Smith* case turned on the phrase "interested in," and is distinguishable. As to the question of territory (referred to by HODGINS, J.A.) see Halsbury's Laws of England, vol. 27, para. 1077, p. 555.

Ryckman, in reply.

November 13. MEREDITH, C.J.O.:—This is an appeal by the defendant from an order dated the 19th September, 1914, made by Latchford, J., restraining the appellant until the trial or other final disposition of the action "from entering into or continuing in business as a dyer and cleaner of cloth, laces, gloves, feathers, and other articles of dry goods, including French cleaning, dyeing, and pressing, in the Province of Ontario, and from entering into competition with or opposition to the business carried on by the plaintiffs or either of them as dyer and cleaner of cloths and other articles of dry goods, including what is known as French cleaning, dyeing, and pressing, either alone or jointly with or as agent or otherwise for any other person, firm, or company, directly or indirectly."

On the 23rd April, 1914, the appellant entered into an agreement with the respondents by which she covenanted with them in the following terms: "And in further consideration of the payments aforesaid Mrs. Smith does hereby covenant and agree with the Parker company and the Smith company that she will not, either alone or jointly with or as agent or otherwise for any other person, firm, or company, directly or indirectly enter into competition with or opposition to the business of the Parker company or the Smith company within the Province of Ontario for a period of three years from the date of this agreement."

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Shortly after the making of this agreement, a business which admittedly competes with the business of the respondents was commenced and is being carried on in Toronto ostensibly by O. E. Smith, a daughter of the appellant, and a circular announcing the opening of this business was sent out, in which it is stated that it is "under the management of Mrs. E. T. Smith," *i.e.*, the appellant.

An advertisement in the following form was also published in the *Toronto World*:—

“ ‘Smith’
“French Cleaning, Dyeing and Pressing.
“85 Bloor St. West.
“Under the management of
“Mrs. E. T. Smith.
“ ‘Phone N. 6244.’ ”

The appellant, when under examination for the purpose of the motion before my brother Latchford, admitted that she knew of the circular, but she denied that she had any knowledge of the advertisement in the *Toronto World*.

The testimony of the appellant on her examination was given in a very unsatisfactory manner, and her attempt to explain what was her exact position in or in connection with the business ostensibly carried on by her daughter, was also very unsatisfactory.

The material before the learned Judge fully warranted the conclusion that this business, as the circular indicates, was being carried on under her management; and that, in my opinion, constituted a breach of her covenant.

None of the cases cited by Mr. Ryckman supports the proposition for which he contended, that the appellant, by acting as manager of the competing business, did not violate her agreement with the respondents.

It may be that, if the covenant had been merely not to enter into competition with or opposition to the business of the respondents, acting as manager of a competing or opposing business would not be a breach of the covenant, but the covenant is far wider than that, and extends also to the act of entering into

competition or opposition as agent or otherwise for any other person, firm, or company; and becoming the manager of a competing or opposing business was, I think, clearly a breach of that part of the covenant, both in its spirit and its letter.

It will, of course, be open to the appellant upon the trial of the action to adduce further evidence which may lead to a different conclusion from that which has been reached upon the present material as to her position with reference to the competing or opposing business which has been carried on under the daughter's name, and it will also be open to the respondents to establish, if they can, that the business is really the business of the appellant.

It was also contended by the appellant that the injunction order was too wide in its terms, and that it ought to have specified the acts from the doing which it was intended that it should restrain the appellant; but that contention is not, I think, well-founded.

As was said by Cozens-Hardy, M.R., in *Earl Dysart v. Hamerton & Co.*, [1914] 1 Ch. 822, 833: "It is not the practice of the Court, when a wrong has been established, to suggest how or under what circumstances, if at all, the defendant may so far modify his arrangements as not to infringe the injunction;" and, as is pointed out in the Law Quarterly, vol. 30, p. 265: "The practice of granting an injunction in general terms, and leaving the party enjoined to find out how to comply with its terms, was familiar practice in the days of Lord Eldon: *Lane v. Newdegate* (1804), 10 Ves. 192, 7 R.R. 381; and has the authority of the House of Lords: *Elliott v. North Eastern R.W. Co.* (1863), 10 H.L.C. 333, at pp. 358, 359, 138 R.R. at p. 189. In *Curl Bros. Limited v. Webster*, [1904] 1 Ch. 685, 73 L.J. Ch. 540, Farwell, J., adopted the same rule in the case of a breach of contract;" and in *Wood v. Conway Corporation*, [1914] 2 Ch. 47, this practice was followed.

I think, however, that, as my brother Hodgins points out in his opinion, which I have had the opportunity of reading, the injunction order is wider in its terms than it should have been, and that it should be varied by restraining the appellant until

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the trial or other disposition of the action from, either alone or jointly with or as agent or otherwise for any other person, firm, or company, directly or indirectly entering into competition with or opposition to the business of the respondents or either of them.

The order with that variation will be affirmed, and the appeal dismissed with costs.

MACLAREN and MAGEE, J.J.A., concurred.

HODGINS, J.A.:—The covenant of the appellant is directed to secure the respondents against competition or opposition by the appellant, and does not provide, as is usual, against her being interested or engaged in a business which business itself competes with the business of the respondents. This renders inapplicable many cases cited on the argument.

It is to be noted that the appellant is recited in the agreement as having been employed “as a manager” in the Parker or Smith business, and dismissed “from their employment as manager.”

It would therefore have been easy, as pointed out by Swinfen Eady, J., in *Gophir Diamond Co. v. Wood*, [1902] 1 Ch. 950, to have framed the covenant so as to have prohibited the appellant from acting in that capacity again.

As the covenant is drawn, the appellant covenants that she will not directly or indirectly enter into competition with or opposition to the business of the respondents “either alone or jointly with or as agent or otherwise for any other person, firm, or company.”

Latchford, J., upon the motion before him, construes this covenant as meaning that the appellant, acting as manager of her daughter’s business, is entering into competition with or in opposition to the respondents’ business; holding that “manager” falls within the general words “or otherwise” following the word “agent,” if indeed not within the word “agent” itself.

It is to be remembered that the law looks jealously at a bargain contained in a covenant by which one who has little oppor-

tunity for choice precludes himself from earning his living by the exercise of his calling after a period of service is over: per Lord Haldane, L.C., in *North Western Salt Co. Limited v. Electrolytic Alkali Co. Limited*, [1914] A.C. 461, at p. 471.

I think it is open to argument whether this covenant is broken by the appellant engaging as manager in a business which itself competes with that of the respondents. Does she herself compete, or is it the business, which she does not carry on, which itself competes, with the respondents' undertaking? This is a question of fact, and its decision may perhaps preclude the appellant from acting in any capacity in any business similar to that in which she received her training.

Admittedly the evidence is not complete, and the case has been decided on an assumption which, although favourable to the appellant, may or may not be correct.

It is pointed out and decided in the case to which I have just referred that if the issue of the illegality of the contract as offending against public policy is duly raised in the pleadings, it must be decided as a question of law after the surrounding circumstances have been considered. I do not understand that the Court ought to decide this point upon an application for an interim injunction, unless the parties consent to its being disposed of in that way and before the appellant has the opportunity to set out upon the pleadings her whole defence.

The covenant extends to the whole of Ontario, and the appellant should raise, before a decision is finally come to, all the defences open to her and have them considered in the light of the surrounding circumstances; just as, in that case, it was considered to be the right of the plaintiff to know what he had to meet.

The decision appealed from expresses an opinion as to the construction of this agreement upon what is admittedly an unsatisfactory presentation of the case, due, it is said, to the appellant's want of candour. But it disposes of the whole question, including the suggested defence of illegality. This embarrasses the decision of the case at the trial and goes beyond the protection necessary to be afforded at this stage. The respondents'

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position would be entirely safeguarded by restraining the appellant as provided by the order appealed from, omitting that part of it which restrains the appellant from entering into or continuing in business as a dyer or cleaner, etc., in the Province of Ontario, which it is not alleged she is doing or contemplating.

I think the order appealed from should be modified by striking out this clause, and that the respondents should undertake to bring this action to a speedy trial, and that the costs of this appeal should abide the result of the trial.

*Appeal dismissed (subject to a variation)
 with costs; HODGINS, J.A., dissenting as
 to costs.*

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McMULLEN V. WETLAUFER.

Nov. 17. *Malicious Prosecution—Reasonable and Probable Cause—Advice of Counsel—Approval of Crown Attorney—Malice—Findings of Jury—Dismissal of Action—Costs.*

In an action for malicious prosecution, the existence of malice does not warrant a finding of the lack of reasonable and probable cause; but where malice exists a careful scrutiny of the circumstances is rendered necessary, as the lack of good faith removes any presumption that might otherwise exist in favour of the defendant.

Where the facts are placed fully and fairly before experienced counsel, and in particular where the facts are submitted to the Crown Attorney, and a prosecution is advised, this constitutes reasonable and probable cause. The existence of reasonable and probable cause is to be determined having regard to the facts as they appeared to the defendant at the time of laying the information.

The defendant laid an information against the plaintiff for forgery in writing a certain letter and for perjury in denying the writing of it in testifying in a cause pending in Court. The prosecution terminated favourably to the plaintiff, and he brought this action for malicious prosecution. Before the information was laid, two experts had given an unqualified opinion that the hand which had written a certain other document, admitted to be in the handwriting of the plaintiff, was the hand which wrote the letter. Some other circumstances in connection with the letter pointed to the plaintiff as one who might have written it. The prosecution was advised by an experienced barrister and solicitor, who had been acting for the defendant in litigation in connection with which the letter was written. He and the defendant laid the facts before the Crown Attorney, and the latter approved of the prosecution and directed the issue of a warrant. On the other hand, the plaintiff was a man holding a responsible position, his integrity was unquestioned, and he had denied all knowledge of the letter. The jury found that the defendant was responsible for the prosecution and that there was actual malice on his part:—

Held, that, while the findings were warranted by the evidence, the action must be dismissed upon the ground that there was reasonable and probable cause for the prosecution.

Clements v. Ohrlly (1847), 2 C. & K. 686, considered.

Longdon v. Bilsby (1910), 22 O.L.R. 4, followed.

But held, that the action should be dismissed without costs, because there was malice and because a warrant was issued for the plaintiff's arrest in a case which at most justified the issue of a summons only.

ACTION for malicious prosecution, tried before MIDDLETON, J., and a jury, at Toronto, in November, 1914.

H. H. Dewart, K.C., and *R. T. Harding*, for the plaintiff.

T. N. Phelan, for the defendant.

November 17. MIDDLETON, J.:—The action is for malicious prosecution. I reserved my judgment upon the question of reasonable and probable cause, and allowed the case in the meantime to go to the jury for the purpose of determining the responsibility of the defendant for the prosecution, the question of malice, and to have the damages assessed. (There was no question as to the result of the prosecution.) The jury have found for the plaintiff, with \$4,000 damages; and I must, therefore, determine the question reserved.

The circumstances out of which the prosecution arose were most unusual. A woman named Davis was suing one Wetlaufer, the father of the present defendant, for breach of promise of marriage. Her seduction under the promise was relied upon in aggravation of damages. In an earlier action damages had been obtained by her father for the seduction. A Miss Poyner had, some years before, sued the father for breach of promise of marriage, and had obtained damages.

An action was also pending by Miss Poyner against the two Wetlaufers, father and son, and two women, sisters, in which it was alleged that the four defendants had conspired to defame the plaintiff by circulating statements reflecting upon her morality. It was known that the plaintiff in that action intended to attempt to prove that the Wetlaufers, father and son (married men), kept the two female defendants as their mistresses in a house maintained by them in Toronto. It was also known that Miss Poyner was aiding Miss Davis in the presentation of her

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case and that Miss Davis was staying at Miss Poyner's house. Naturally, the feeling between the Wetlaufers and these two plaintiffs was intensely bitter. Miss Davis's action was on for trial at Toronto, and Miss Poyner's action stood next upon the list for hearing.

The plaintiff in this action, McMullen, is a county constable, and had aided Miss Poyner in the prosecution of her action for breach of promise, determined some four years ago; and it was known that he was now assisting her in the prosecution of her action, and also assisting Miss Davis in her suit.

Two anonymous letters had been written some time previously, one of them to the father of the two alleged mistresses of the Wetlaufers. A third letter, purporting to be signed by the wife of the younger Wetlaufer, had been sent to the morality inspector on the police staff. This letter, it is admitted, was not signed by the wife. About the time this letter was sent, McMullen had attended at the police office and had asked the inspector what steps should be taken by Mrs. Wetlaufer in order to obtain redress against her husband for his neglect and misconduct. McMullen was told by the inspector that the complaint of the wife in person or by letter was necessary before the police would take any action. When the letter was received, the inspector assumed it to be genuine, and, in view of the gravity of the charges made, wrote Mrs. Wetlaufer asking a personal interview. To this she replied stating that she had not written or made any complaint. The facts were known to the defendant and his solicitor.

For the purpose of the trial it was deemed important to ascertain the authorship of the letters, and an expert was consulted, who advised that the letters had not been written by Miss Davis, Miss Poyner, or either of the two alleged mistresses, but that one hand had written all three letters.

Up to this time no suspicion had rested upon McMullen; but a few days before the trial a subpœna was served on one of the defendants at the instance of Miss Davis, and it was thought that the written portions of the subpœna bore a resemblance to the handwriting of the letters. This subpœna was served by McMullen.

The subpœna was then submitted to the expert, who pronounced the opinion that the writing was identical with that of the three letters.

During the trial of the action of *Davis v. Wetlaufer*, McMullen gave evidence as to certain matters, and in the course of his cross-examination he was shewn the subpœna and asked if the written parts were his handwriting. He stated that they were. He was then warned that he would be shewn certain letters, and told that, if he denied the authorship, he would be prosecuted for both perjury and forgery; if he admitted the authorship, he would be prosecuted for forgery. He was then shewn the three letters, and denied all knowledge of them; and the incident closed. Up to this time, it is said, McMullen was not in any way suspected of being the author of the letters.

Immediately an information was laid for forgery on the letter purporting to be sent by Mrs. Wetlaufer, and for perjury in the denial of it. McMullen was called from the court-room and arrested at the court-door, although he was then acting as crier. The jury have found, and were well warranted in finding, that actual malice existed. The object of the arrest was, no doubt, to influence the conduct of the conspiracy action, which was then about to come on for trial and in which it was known that McMullen would be a witness.

The existence of malice does not warrant a finding of the lack of reasonable and probable cause; but where malice exists a careful scrutiny of the circumstances is rendered necessary, as the lack of good faith removes any presumption that might otherwise exist in favour of the defendant.

Before the information was laid, two experts had given an unqualified opinion that the same hand which had written the subpœna had written the letters. McMullen had admitted having written the subpœna; McMullen, it was known, was interested in the litigation; and it was known that McMullen knew that the police would only be set in motion against the Wetlaufers upon the complaint of the wife. This, and McMullen's denial of all knowledge of the letters, constitute the material facts as known to the defendant at the time the information was

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laid; and I think it is my duty to attempt to determine the existence of reasonable and probable cause having regard to the facts as they then appeared to the defendant.

Mr. Godfrey, who had been acting for the defendant throughout, advised the prosecution. He and the defendant laid the facts before the Crown Attorney, and the Crown Attorney approved of the prosecution and directed the issue of a warrant.

Were I not trammelled by authority, I should hold that the advice of the expert and of the defendant's legal adviser and of the Crown Attorney, while going to negative malice, had no bearing upon the question of reasonable and probable cause; but I think that authorities binding upon me compel me to determine that where the facts are placed fully and fairly before experienced counsel, and in particular where the facts are submitted to the Crown Attorney, and a prosecution is advised, this constitutes reasonable and probable cause.

It has not been suggested that the Crown Attorney or the defendant's legal adviser acted in any way dishonestly. All the facts were known to Mr. Godfrey; he did nothing to mislead the Crown Attorney. In finding in the defendant's favour, I base my finding entirely upon the ground that on the authorities the advice given constitutes reasonable and probable cause. The advice of a competent counsel, having knowledge of all the facts, has been determined to be reasonable and probable cause for a prosecution.

I do not think that the prosecution was justified or that there was, apart from such advice, any reasonable or probable cause for its institution. The case is singularly like *Clements v. Ohrlly* (1847), 2 C. & K. 686, where Chief Justice Denman said: "Before the plaintiff in this case can entitle himself to your verdict, you must be satisfied that there was malice, and I must be satisfied that there was a want of reasonable and probable cause. Undoubtedly the charge is utterly unfounded; and I express my opinion that there was no reasonable or probable cause for the making of it. In my opinion, similarity of handwriting is not enough to constitute probable cause for charging a person with forgery without evidence of other circumstances, and parties cannot create probable cause by referring to others, whether they

be the most practised attorneys or the most experienced counsel; and there are strong reasons why this should not exempt them from responsibility. If there be want of probable cause, and the jury find that there was malice, parties cannot put the matter off upon their attorneys and counsel.’’

In the case in hand there was similarity in handwriting, there was advice. The other circumstances are quite inadequate to point to McMullen’s guilt. He was a man holding a responsible position; his integrity appears to have been unquestioned; he had denied all knowledge of the letters; and this more than counterbalanced any suspicion that might have arisen by reason of the interview that he had with the inspector. The reasoning of Lord Denman commends itself very strongly to me, but it is opposed to authorities which I feel bound to follow, for the reasons assigned in *Longdon v. Bilsky* (1910), 22 O.L.R. 4.

In justice to the plaintiff, it should be stated that his interview with the inspector took place under the following circumstances. He had acted for Miss Poyner, as already said, some two years earlier. For his services then rendered he had received a small sum, I think \$20. On the occasion in question he was called from the court-room to see Miss Poyner, and she asked him what steps were necessary to secure for Mrs. Wetlaufer the assistance of the police. He went to the police office, made the inquiry, reported to her, and knew no more of the matter. In this he acted without fee or reward. In the recent investigation he had been looking up evidence and serving papers, for which he was entitled to receive about a similar sum to that mentioned, and he had no other connection with the matter.

It follows from the foregoing that the action fails; but I dismiss the action without costs: firstly, because there was malice; and, secondly, because I desire to express in this way disapproval of the course adopted in issuing a warrant in a case which at most justified only the issue of a summons.

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Ditches and Watercourses Act—Award of Township Engineer—Construction of Drain—Appointment of Engineer—Regularity—De Facto Engineer—Amendment—Appeal from Award—Time—Ruling of County Court Judge—Error—Land of Infant Affected by Award — Notice—“Owner”—Father—“Guardian of an Infant”—R.S.O. 1897, ch. 285, secs. 3, 8—Sufficiency of Outlet.

In an action brought by three of the land-owners affected by an award made by the defendant F., as engineer of the township of M., under the Ditches and Watercourses Act, against the defendant R., who originated the proceedings under the Act, the defendant F. aforesaid, and the defendant C., the township engineer at the time when the action was brought, for a declaration that the award was illegal and made without jurisdiction and for an injunction and damages:—

Held, (1) that the defendant F. was duly appointed engineer of the township, although the appointment of his predecessor had not been expressly revoked; apart from that, he was the *de facto* engineer of the township, and his actions were not open to question by reason of any possible defect in the mode of his appointment; and leave to the plaintiffs to amend by setting up that the defendant F. was not qualified as township engineer was refused.

(2) That the validity of the award was not affected by the ruling of a County Court Judge that an appeal to him from the award was not brought in time, even if the ruling was, as the plaintiffs contended, erroneous; and leave to set up this ground of invalidity by way of amendment was also refused.

(3) That notice to the father of an infant land-owner affected by the award was sufficient to satisfy sec. 8 of the Ditches and Watercourses Act, R.S.O. 1897, ch. 285, which requires notice to be given to every “owner;” for, by the interpretation clause, “owner” includes “the guardian of an infant owner,” and the father is guardian by nature, and the guardian intended by the statute, where there is no duly appointed guardian.

Rimington v. Hartley (1880), 14 Ch.D. 630, followed.

(4) That the ditch or drain constructed under the award had a sufficient outlet into Lake Simcoe.

McGillivray v. Township of Lochiel (1904), 6 O.L.R. 446, explained.

Chapman v. McEwen (1905), 6 O.W.R. 164, approved.

ACTION to restrain the defendants from proceeding with the construction of a ditch or drain under an award made by the defendant Fitton pursuant to the Ditches and Watercourses Act, and for a declaration that the award was illegal and made without jurisdiction, and for damages.

November 10. The action was tried by MIDDLETON, J., without a jury, at Toronto.

S. S. Sharpe, for the plaintiffs.

J. M. Ferguson and J. T. Mulcahy, for the defendants.

November 17. MIDDLETON, J.:—The plaintiffs are three of those concerned in an award made by Mr. Fitton, as engineer of the township of Mara, under the Ditches and Watercourses Act. The defendants are Mr. Ross, who originated the proceedings under the Act, Mr. Fitton, the township engineer at the time, and Mr. Cavana, the present township engineer. The other persons interested in the award are not parties to the action.

I think much might be said as to the constitution of the action, in that the other parties to the award, it appears to me, have vested interests, and as to the propriety of joining the two engineers, the conduct of Mr. Fitton being in no way attacked and nothing whatever being alleged or proved as against Mr. Cavana; but, in the view that I take of the case, it is not necessary to consider these questions.

The lands affected by the award are mainly low-lying and swampy lands in the township of Mara, upon the shores of Lake Simcoe. The elevation of these lands above the lake level is so slight that it is difficult and perhaps impossible to devise an entirely satisfactory scheme of drainage. Upon the requisition made, Mr. Fitton, an entirely competent engineer and a man of much experience in drainage matters, did his best to solve the difficult problem presented. Other drains had been constructed, and these are not at the present time sufficient. The new work directed by the award in question consists in part of a drain through some cleared land adjoining an elm swamp, to take the place of an old drain which passes through the swamp, overgrown and choked, and quite inadequate. The new drain starts from a point on the borders of lot 24, where it leaves the course of the old drain and reaches Lake Simcoe by a route which is deemed preferable because in the first place it is shorter and in the next place it goes through open land where there is less danger of obstruction, the outlet being not far distant from the outlet of the old drain upon the shores of the lake.

The validity of the award is attacked upon three grounds: first, it is said that there is not a sufficient outlet; secondly, that the engineer was not duly appointed; and thirdly, that the award affects the land of one William Johnston junior, an infant who was not duly served with notice of the proceedings.

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No attack upon Mr. Fitton's position as township engineer is made upon the pleadings, but it was sought to set it up by way of amendment. I reserved judgment upon the motion for leave to amend until I could ascertain what foundation there was for the attack. I am satisfied that the attack entirely fails, and I think that my discretion ought to be exercised against allowing the amendment sought.

The attack upon Mr. Fitton's appointment is based upon a complete misunderstanding of the situation. By a by-law of the township council, passed in February, 1897, Mr. James Sheridan was appointed township engineer. He was not appointed engineer under the Act in question. The by-law is intitled "By-law 268 to Appoint Township Officers for the Year 1897," and the appointment is to office "until his or their successors has or have been duly appointed and qualified or until otherwise relieved by this council." A similar by-law was passed in 1898, to appoint officers for the year 1898; Mr. Patrick Kelly was appointed township engineer. In 1899, a by-law was passed, No. 373, "that C. E. Fitton, P.L.S., be and is hereby appointed engineer under the Ditches and Watercourses Act to perform all the duties required of an engineer by the said Act."

The argument is, that Mr. Fitton could not be appointed unless and until the appointment of the previous engineers under the by-laws of 1897 and 1898 had been expressly revoked. I can see nothing in this argument. Mr. Fitton was duly appointed under the Act.

Quite apart from this, Mr. Fitton held office under that by-law until the year 1912, and was certainly the *de facto* engineer of the township, and his actions are not open to question by reason of any possible defect in the mode of his appointment.

Application to amend was also made for the purpose of allowing the award to be attacked upon the ground that an appeal had been had from the award which the Judge of the County Court ruled was not brought in time. It is said that this ruling was erroneous. If so, possibly proceedings by way of mandamus might have been open to those aggrieved; but it appeared clear

to me that this in no way affected the validity of the award. So far as the matter was gone into, it also appeared that the ruling of His Honour was quite correct.

William Johnston, the father, owned lot 25. His son William Johnston junior, it is said, is the owner of lot 26. At the time of the award in 1910, he was seventeen or eighteen years old. Lot 26 was purchased with the father's money. The deed was taken, it is said, to the son. The deed is not produced, and I do not know whether there is anything on the face of it to indicate that the younger man was intended. It was assumed by all that one man, the father, owned both lots. When the engineer's meeting was called and he was upon the ground, Johnston senior stated that his son owned lot 26. The engineer saw the young man, who was present upon the farm, and told him that it was his (the engineer's) duty to adjourn the meeting so that notice might be given to him (the son); but, as all parties were entirely friendly at this time, Johnston junior acquiesced in the proceedings, and, so far as an infant is capable of doing so, waived notice. As he was an infant, I do not think his waiver of notice is effectual. The award cast upon him the duty of maintaining the drain through his land, lot 26. As this is mainly swamp adjoining the lake, it is possible that it is not fair to put this burden upon him. If the father owned both lots, there would be no unfairness, as far as shewn, in calling upon him to maintain the drain across both lots.

Johnston junior, now of age, is being utilised by two other dissatisfied owners, Healy and McElroy, for the purpose of assisting them in their attack upon the award.

The Ditches and Watercourses Act, R.S.O. 1897, ch. 285, sec. 8, requires notice to be given to every "owner," but by the interpretation clause, sec. 3, "'owner' shall mean and include an owner . . . the guardian of an infant owner . . . ;" and it is now argued that the notice to the father was sufficient, as he was the guardian of his infant son within the meaning of the statute.

I have not been able to find any authority upon this statute dealing with this question; but under the English Partition

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Act a similar question has arisen. There, a sale might be had instead of partition upon the request of the guardian of an infant. Vice-Chancellor Malins, in *Platt v. Platt* (1880), 28 W.R. 533, had held that the word "guardian" in the statute meant a testamentary guardian or a guardian appointed by some order of the Court. Almost immediately thereafter the same question arose before Jessel, M.R., in *Rimington v. Hartley* (1880), 14 Ch. D. 630, and he refused to adopt the view entertained by the Vice-Chancellor. In the result he held that words found in a later part of the section applied, and only a guardian authorised to act for the infant, and therefore a guardian *ad litem*, could give the consent required by the statute; but his discussion of the meaning of the word "guardian," if not controlled by any other words in the statute, is illuminative: "What does the word 'guardian,' standing alone, generally mean? I suppose guardian of the person. An infant may have several guardians: he may have a guardian of the person or a guardian in socage. . . . But I suppose 'guardian' of an infant means guardian of the person. . . . You cannot restrict it, as the Vice-Chancellor restricts it; for it could not be supposed that the Act meant to exclude the commonest case of all, that of an infant having a living father."

I have come to the conclusion that a notice to the father is such a notice as was required by the statute. There could be no guardian *ad litem*, for there is no *lis* pending. There could be no guardian appointed by the Surrogate Court without the father's consent. The statute contemplates that any owner desiring to have the drain constructed should be able to proceed under the Act, even if one of the owners affected is an infant, and therefore the notice required is to the guardian by nature of the person of the infant, unless he should chance to have some other duly appointed guardian.

The guardianship of the father is recognised by our statutes. The Infants Act, R.S.O. 1914, ch. 153, takes the father's guardianship for granted. During the lifetime of the father he may be appointed Surrogate guardian, or some other person with the father's consent may be appointed Surrogate guardian, such

guardian having authority not only over the person but over the estate of the infant. See sec. 32. Under sec. 28, on the death of the father the mother becomes the guardian of the infant, unless the father has exercised his right of appointing another guardian. The mother, or the testamentary guardian appointed by the father, would not have any right under sec. 32 over the property of the infant. The statute in question does not require that the person to whom notice is given shall have been constituted guardian of the infant's estate.

The remaining question, that of the sufficiency of the outlet, arises from a misunderstanding of the decision in *McGillivray v. Township of Lochiel* (1904), 8 O.L.R. 446. No doubt, the statute contemplates that every drain should be carried to an adequate and sufficient outlet. What was held in that case was that a sufficient outlet was in one sense a condition precedent to the validity of proceedings under the statute so as to justify the diversion of water when third parties were concerned. Under the colour of a drainage award, certain persons had brought water on to the plaintiff's property. He sought an injunction and damages. It was held that no award under the statute could justify the bringing of this water on to the lands in question. All that the statute authorised was the taking of water to a proper outlet, that is, some place it would not injure the land of others.

The drainage scheme here is the discharge of these waters into Lake Simcoe. Lake Simcoe is undoubtedly a proper outlet, and the water, once brought there, could injure no one. It is said that to reach Lake Simcoe the ditch would have to be carried across the lands of certain persons without much fall, and at a level little, if any, above the lake level. The argument is, that this last mile of ditch is not a proper outlet; it is not the outlet at all; the outlet is the lake. This mile forms part of the ditch, and the owners of the land which it crosses are parties to the award; and, if any wrong was done to them by the engineer, their remedy was by way of appeal from the award.

The true meaning of the statute is, I think, apparent from the

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judgment of my brother Britton in the case of *Chapman v. McEwen* (1905), 6 O.W.R. 164, a judgment which is entitled to the greatest respect by reason of the experience my learned brother had as Drainage Referee for many years.

The action fails and must be dismissed with costs.

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OSKEY V. CITY OF KINGSTON.

Nov. 20.

Alien Enemy—Residence in Ontario—Action Begun before War—Right to Continue—Proclamation of August, 1914 — Negligence — Death of Workman in Factory—Action under Fatal Accidents Act—Electric Shock—Liability of City Corporation Supplying Defective Current—Liability of Employer—Negligence—Evidence.

The plaintiffs, a widow and her children, in an action under the Fatal Accidents Act to recover damages for the death of O., the husband and father, by reason of the negligence of the defendants, or one of them, were subjects of the Emperor of Austro-Hungary, and were residing in Ontario, whither they had come with the deceased a short time before his death. The death occurred and the action was begun before war was declared between the Emperor and his Britannic Majesty:—

Held, notwithstanding that the plaintiffs were alien enemies, that they were entitled to continue the action: they came within the terms of the Proclamation of the Governor-General of Canada of the 13th August, 1914. *Princess Thurn and Taxis v. Moffitt*, [1914] W.N. 379, followed.

The death of O. was occasioned by an electric shock which he received when he picked up, by the order of his superior, a portable electric lamp in the factory of the defendant company, by which he was employed:—

Held, upon the evidence, that the defendant city corporation, which supplied electricity to the defendant company, was not liable for the death of O., no defect being shewn in its lighting system and no negligence or want of care in the operation thereof.

Held, that the defendant company was liable for the death of O., which was occasioned by its negligence: such negligence consisting in the company's failure to test the insulation of the wire which carried the current to the lamp, and to remedy a defect in insulation, and in the failure to provide means for carrying the lamp safely.

ACTION by Julia Oskey, the widow of John Oskey, and by her three infant children, against the Corporation of the City of Kingston and the Frontenac Floor and Wall Tile Company Limited, to recover damages, under the Fatal Accidents Act, for the death of John Oskey by reason of the negligence of the defendants, or one of them, as the plaintiffs alleged.

October 7 and 8. The action was tried by BRITTON, J., without a jury, at Kingston.

A. B. Cunningham, for the plaintiffs.

J. L. Whiting, K.C., and *D. A. Givens*, for the defendant city corporation.

J. M. Godfrey, for the defendant company.

November 20. BRITTON, J.:—The action is by Julia Oskey, the widow, and Anna, Marguerite, and John Oskey, children, of John Oskey, for damages resulting from the death of John Oskey, who was killed at Kingston on the 29th March, 1914.

The deceased was a workman in the employ of the Frontenac Floor and Wall Tile Company Limited. On the day of his death, he was at work in the company's building, and was asked by the assistant manager to hand to him an electric lamp, which was attached to an extension cord. The deceased, in complying with the request or order, picked up the electric lamp, and immediately received an electric shock, causing his almost instant death.

The plaintiffs allege negligence on the part of the company in the arrangement of this portable lamp, and particularly in not having a wooden or some other non-conducting handle, or in not having the lighting wire properly insulated, or in not having the wire screen now covering the glass bulb so insulated that such an accident as happened in the present case could not occur.

The plaintiffs also allege that the Corporation of the City of Kingston was guilty of negligence that caused the death of Oskey. That corporation is the owner of the power plant that supplies electricity to the company named, to the extent of 110 volts, for lighting purposes.

The plaintiffs charge that the city corporation negligently allowed the wire which carried the current of electricity for lighting purposes to the works of the defendant company, to become foul with a wire of a much higher voltage than 110 volts. This higher voltage caused the electric light wire to be overcharged, and caused the wire screen covering the lamp to be heavily charged, and by reason thereof the deceased was killed; and so the plaintiffs claim to be entitled to recover damages from the city corporation.

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That the death of Oskey was occasioned by an electric shock, when he picked up the bulb enclosing the light, is beyond any doubt. There was no autopsy, but the deceased was a strong and healthy man, and there was no other cause of death apparent.

Immediately prior to the day of his death, he had been at night work, and it is quite possible that he was not as strong as he had been, and possibly he was not as able to resist such a shock as he would have been at his maximum of strength. The deceased was and had been up to the last moment of his life in fair working condition and earning his average wages.

I find that the death was occasioned by an electric shock caused by the electric current carried by the wire to the factory of the defendant company for lighting purposes. According to the evidence, a comparatively light current will sometimes prove fatal.

Usually 110 volts will not to the ordinary healthy person prove fatal. There was a higher voltage in this case, but not such as the plaintiffs thought and attempted to prove. The condition of the hand of the deceased was not such as if killed by the higher voltage. There was no mark of burning. There were no marks on any part of the body of the deceased resulting from the electric current. As evidence that the shock was not caused by electricity from the high voltage wire coming from the powerhouse to the transformer, there was no damage to the transformer.

Immediately after the accident, the city employees made what, in my opinion, was a careful inspection, and found nothing wrong. No defect in the plant of the city was found. A couple of instances of there being something wrong in the working of the motors of the tannery was discovered, but it was stated that what happened there had no connection with any alleged escape of electricity from the high voltage wire to the defendant company's factory. What was shewn did not in any way tend to establish that there was any defect in the city's system, or that there was negligence or want of care in its operation.

I fully recognise that an electrical company, or any city, town, or village, maintaining electric wires over or by which a

high voltage of electricity is conveyed, is under the duty and obligation of using every means known to them, and to those having expert knowledge, to render the wires safe for those using premises wired for electricity and for those working, or having occasion to be, in close proximity to these wires. As to the city corporation, I have placed the burden of proof upon it; and, in my opinion, the onus has been satisfied.

The plaintiffs have not established their allegation that the death of John Oskey was "caused by the negligence of the defendant the Corporation of the City of Kingston in failing to exercise the proper caution required by concerns engaged in supplying power and light, and in allowing a dangerous volume of electricity to escape from its system along the electric lighting wire with which the portable lamp was connected."

The action as against the city corporation will be dismissed.

The defendant the Frontenac Wall and Floor Tile Company was negligent, and its negligence occasioned the death of Oskey. Oskey, as an employee about his work, did what was required of him, and in doing so received the shock.

The negligence of the company—of the overseer—was in not testing the insulation of the wire to see if it was properly insulated, and, if found defective, in not having that defect remedied. There was further negligence in not having a wooden handle, or a handle of some non-conducting material, so that the light could be safely carried. Then the screen or cage which protected the lamp against breaking in case of a fall was no protection to the workman. These wires, as in the present case, would, in case of leakage of electricity, become charged, and there was negligence in not having these covering wires insulated; or in not having a covering over or in place of wires, as at present. No difficulty exists in having protection to render the portable lamp reasonably safe for persons carrying it.

Upon cross-examination of the widow, the plaintiff, she stated that she was born in Hungary; and so it was argued that, as an alien enemy, belonging to a country with which Canada is at war, she could not maintain this action. About seven or eight years ago, the deceased, with his wife, one infant son, and an infant

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daughter, left Hungary and went to the United States. Shortly before the accident, the deceased, with his wife and children, came to Canada, apparently with the intention of making Canada his permanent place of residence. The death occurred, and this action was commenced, before war was declared, and I am of opinion that the plaintiffs are entitled to enforce their claim in our Courts.

In the very recent case of *Princess Thurn and Taxis v. Moffitt*, [1914] W.N. 379, Mr. Justice Sargant said that there appeared to be a general impression that during the continuance of a state of war an alien enemy, as such, was not entitled to any relief as a plaintiff in the Courts of this country; but, in his Lordship's opinion, that proposition was too widely stated, and did not apply to a person in the position of the plaintiff in that case.

In Hall's International Law, 6th ed., p. 388, it is said: "When persons are allowed to remain either for a specified time after the commencement of war or during good behaviour they are exonerated from the disabilities of enemies, for such time as they in fact stay, and they are placed in the same position as other foreigners, except that they cannot carry on a direct trade in their own or other enemies' vessels, with the enemy country." See *Wells v. Williams* (1697), 1 Salk. 46.

The plaintiffs are within the Proclamation of His Royal Highness the Governor General of Canada of the 13th day of August, 1914. This proclamation, after reciting that there are many immigrants of Austro-Hungarian nationality quietly pursuing their usual avocations in various part of Canada, and it is desirable that such persons should continue in such avocations without interruption, is as follows: "1. Such persons so long as they quietly pursue their ordinary avocations shall not be arrested, detained or interfered with, unless there is reasonable ground to believe that they are engaged in espionage, or attempting to engage in acts of a hostile nature, or to give information to the enemy, or unless they otherwise contravene any law, order in council or proclamation."

It follows that the plaintiffs are entitled to continue this

action and to recover. In such cases as the one now in hand, it is always difficult to ascertain what amount would be just to the family and not oppressive to the defendants. The deceased was a good worker and a good provider. Up to the time of his death he had been receiving as wages \$80 a month. He was in the prime of life—not more than forty—and his wife nearly the same age; the son John, fifteen years old; the daughter Anna, eleven; and Marguerite, about seven.

I assess the damages at \$2,000, and I allot the same as follows: \$1,200 to the widow, \$200 to the son John, and \$300 each to the daughters Anna and Marguerite. The infants' money will be paid into Court to their credit for them.

The action against the city corporation will be dismissed, with costs if demanded.

There will be judgment against the Frontenac Wall and Floor Tile Company for \$2,000, with costs. If the sum of \$2,000 is reduced by reason of costs, the amounts allotted will abate *pro ratâ*.

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Nov. 25.

Municipal Corporation—By-law Authorised by Municipal Act, sec. 400, sub-sec. 49—Protection of Public—Infraction of By-law—Boy under Sixteen Permitted by Employer to Drive Horse in Public Streets—Injury to Boy—Breach of Statutory Duty—Cause of Action against Employer—Negligence—Costs.

A by-law of the City of Toronto, passed pursuant to the clause of the Municipal Act, now R.S.O. 1914, ch. 192, sec. 400, sub-sec. 49, authorising a municipality to pass by-laws to regulate traffic in the public streets, provided that no vehicle should be driven upon any street in the city in charge of any driver less than sixteen years old:—

Held, that the prohibition of the by-law was not for the protection of the driver, but for the protection of the public; and the breach of it by the employer of a boy under sixteen, in permitting the boy to drive a horse in the public streets, did not give the boy a cause of action against his employer for injury sustained while so driving.

Fahey v. Jephcott (1901), 2 O.L.R. 449, *Hagie v. Laplante* (1910), 20 O.L.R. 339, and *Fowell v. Grafton* (1910), 22 O.L.R. 550, distinguished.

Held, also, upon the evidence, that the injury was the result of the boy's own carelessness, and was not caused by any negligence on the part of his employer.

The action, as against the employer, was dismissed, but without costs, because the employer was guilty of an infraction of the salutary provision of the by-law.

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ACTION brought on behalf of an infant, by his father as next friend, to recover damages on account of injuries sustained by him as the result of a runaway accident on the 8th May, 1913, by reason, as the plaintiff alleged, of the negligence of the defendant Thorn and the defendant Squire, or one of them.

November 13. The action was tried by MIDDLETON, J., without a jury, at Toronto.

George Wilkie, for the plaintiff.

Frank Denton, K.C., for the defendant Thorn.

W. N. Anderson, for the defendant Squire.

November 25. MIDDLETON, J.:—The defendant Thorn is a grocer carrying on business in a small way in Toronto. The plaintiff, a lad of fifteen, was employed in connection with Thorn's grocery business after school hours and on holidays. Thorn had, in connection with his business, an old horse, which the plaintiff sometimes drove, both in delivering goods ordered and in calling at the houses of regular customers for the purpose of obtaining orders.

The plaintiff was apparently fond of horses, and was by no means satisfied with this staid animal, and used to hire and drive horses from the livery stable of the defendant Squire. In this amusement he was joined by other lads of similar age, and this course of conduct was not only in violation of the by-laws of the city, but was regarded as dangerous by the boy's father, and by the police, to whom the exploits of the plaintiff and his companions were reported. The result was, that Squire was forbidden, not only by the father, but by the police, to entrust horses to the boy.

On the day in question Thorn's horse was sick, and at about 1.30 the plaintiff turned up at the store, instead of going to school. Thorn sent him to Squire's livery stable to make some inquiries with reference to the possibility of obtaining a horse. There was some difference between the parties as to whether the plaintiff was to confine himself to making inquiries only, or whether he was to get a horse. This difference is not material, for Squire refused to give a horse to the boy, reminding him of

his instructions; and finally Squire telephoned to Thorn, who said that the horse was intended for his own use and would be driven by him. Thereupon a horse was given to the boy, with a halter, and the boy led it to Thorn's stable. There he met a companion, and the horse was harnessed.

It was suggested that the horse was of a vicious disposition. This accusation is in no way supported by the evidence. The horse was quiet and well-behaved. Though the plaintiff had had much experience in the harnessing of horses, he did not properly harness this horse on this occasion; he failed to adjust the crupper around the tail. The plaintiff then took the horse, as he says, to the store. Again there is a conflict upon the evidence. The boy says he was told to take the horse out for the purpose of soliciting an order; Thorn says that he did not see the boy and did not hear of him after he had sent him to Squire's stable until after the accident had taken place. However, the boy went to the customer's house, and was returning to the store, having with him one of his companions. While going south on Huron Street, by reason of the failure to harness the horse properly, the breeching strap fell about the horse's legs and frightened it. The horse then ran away, and at College street ran into another rig, and was killed. The boy's companion had dropped from the waggon and escaped; the plaintiff was thrown, and sustained some injury.

The whole accident was the direct result of the plaintiff's own carelessness in the harnessing of the horse, and he cannot maintain the action unless the defendants have been guilty of a breach of a by-law of the city, and this breach confers upon the plaintiff some right of action. I do not think that there was any negligence in entrusting the horse to the boy. He was quite competent to harness it, and, if the horse had been properly harnessed, he was quite competent to drive and manage it.

At the trial of the action it was plain that no case existed as against the defendant Squire, and I dismissed the action as to him.

The main contention is, that the municipal by-law number 5770, intituled "A By-law to regulate Traffic in the Public Streets," and which, *inter alia*, enacts that "no vehicle shall be

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driven upon any street in the city in charge of any driver less than sixteen years of age," was violated by entrusting the horse and waggon in question to the plaintiff. The defendant Thorn denies that he entrusted the horse to the boy. I feel compelled, after considering the evidence carefully, to determine this question against him. I think he either expressly instructed the plaintiff to take the horse out and canvass for orders, or acquiesced in his so doing. The fact that he had allowed the boy to perform the like services with the other horse, knowing this to be a violation of the by-law, aids me in coming to this conclusion. Apart from that, I accept in its entirety the evidence of Leo Harrigan, and he confirms the plaintiff's story of the accident by corroborating the statement that the plaintiff took the horse to the store. I find it difficult to believe that the defendant would have made no inquiry and would not have troubled himself at all about the boy from 1.30 to 4 p.m. unless he understood that the boy was away with the horse.

I have, however, come to the conclusion that this finding of fact does not entitle the plaintiff to succeed. Undoubtedly, the violation of a statutory obligation may often confer a right of action, and, as is said by Sir Charles Moss in *Fahey v. Jephcott* (1901), 2 O.L.R. 449, 461, whether this liability is to be classed as negligence, or as breach of a statutory duty resulting in an injury, does not appear to be material. In each case it is necessary to establish that the damage in respect of which relief is sought was within the mischief against which the law intended to provide. In *Fahey v. Jephcott* it was plain that the provision of the Factories Act prohibiting the employment of a girl under eighteen to work between the fixed and traversing parts of a self-acting machine while in motion, was a statute passed primarily for the protection of young and inexperienced workers. The injured girl had no difficulty in shewing that the accident which befell her was the very mischief against which the law intended to provide.

So in *Hagle v. Laplante* (1910), 20 O.L.R. 339, there was no difficulty in determining that an action would lie to recover damages resulting in death occasioned by a breach of a statute re-

quiring hotels to be equipped with fire escapes. The object of the Act was to benefit and protect the occupants of hotels.

So, again, where the law prohibited the selling of an air-gun to a minor under sixteen years of age, one injured by a shot from an air-gun in the hands of a minor to whom it had been sold was held entitled to redress: *Fowell v. Grafton* (1910), 22 O.L.R. 550. The protection of persons from such accidents was the thing aimed at by the statute.

Here, however, the object of the legislation is entirely different. Under the Municipal Act, now R.S.O. 1914, ch. 192, sec. 400, sub-sec. 49, a municipality is authorised to pass by-laws to regulate traffic in the public streets. The by-law in question purports to be passed under this authority. The prohibition of the driving of vehicles by those under sixteen years of age is not for the protection of the driver, but for the protection of the public.

The action, therefore, fails against both defendants.

I can see no reason for refusing the defendant Squire his costs, as he appears to have been in no way in fault; but I do not give Thorn costs, because he was guilty of an infraction of this salutary provision of the by-law.

It is perhaps convenient, in case the action is carried further, that I should assess the damages the plaintiff is entitled to recover if I am wrong in thinking that he fails. The claim made is grossly exaggerated. The action is brought by the boy alone, but I was asked at the hearing to permit the father to be added as a party plaintiff. He is already next friend. The doctor's bill is \$20. I do not think the boy has suffered any permanent injury. The slight facial difficulty does not appear to be attributable to the accident, and it does not call for any substantial pecuniary award. I would think that \$250 would be a liberal amount to allow, in view of the medical evidence. Of this I would give \$100 to the father and the balance to the boy.

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[APPELLATE DIVISION.]

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H. H. VIVIAN CO. LIMITED v. CLERGUE.

Oct. 5.
Nov. 27.*Judgment—Execution—Contract—Construction — Merger — Forfeiture—
Sale of Land—Judgment Unenforceable except as to Costs.*

Judgment in this action was recovered by the plaintiffs in the circumstances set out in the reports in 16 O.L.R. 372 and 41 S.C.R. 607 (*sub nom. Clergue v. H. H. Vivian & Co.*) After the judgment of the Supreme Court of Canada, the plaintiffs sold the mining property in question for \$75,000, after having forfeited it under a power in that behalf contained in an agreement of the 10th March, 1905, to which the plaintiffs, the defendant, and a mining company were parties, the terms of which are set out in the reports referred to:—

Held, that the forfeiture under the agreement, and the sale pursuant thereto, worked such a destruction of the plaintiffs' rights against the defendant as disabled them from further pursuing him in respect of the debt. Construction of the agreement.

Order of KELLY, J., declaring that the plaintiffs were not entitled to enforce their judgment and execution against the defendant, except as to costs, affirmed.

Cameron v. Bradbury (1862), 9 Gr. 67, *Fraser v. Ryan* (1897), 24 A.R. 441, *Gibbons v. Cozens* (1898), 29 O.R. 356, *McPherson v. United States Fidelity and Guaranty Co.* (1914), 6 O.W.N. 677, applied.

MOTION by the defendant for an injunction restraining the plaintiffs from selling land under their execution.

September 30. The motion was heard by KELLY, J., in the Weekly Court at Toronto.

H. S. White, for the defendant.

A. H. F. Lefroy, K.C., for the plaintiffs.

October 5, KELLY, J.:—Unless, as is contended for by the plaintiffs, this can be taken out of the authority of such cases as *Cameron v. Bradbury* (1862), 9 Gr. 67, *Fraser v. Ryan* (1897), 24 A.R. 441, *Gibbons v. Cozens* (1898), 29 O.R. 356, *McPherson v. United States Fidelity and Guaranty Co.* (1914), 6 O.W.N. 677, the plaintiffs cannot, except in respect of costs, enforce their judgment. The judgment was for instalments of purchase-money due to the plaintiffs on their sale of lands, the subject of an offer made on the plaintiffs' behalf to the defendant on the 20th June, 1903, and accepted by him on behalf of himself or assigns three days afterwards.

On the 10th March, 1905, an agreement was entered into between the plaintiffs, the Standard Mining Company of Algoma Limited, and the defendant, whereby, after reciting that the defendant had assigned his contract to the mining company, the plaintiffs agreed to sell to that company the same lands—certain rights of the parties to the first agreement being expressly reserved. The plaintiffs now set up that by this latter agreement the defendant ceased to be a purchaser; that his indebtedness to the plaintiffs, for which they obtained the judgment, was not in respect of purchase-money; and that, though the plaintiffs, since the judgment was obtained, forfeited the lands to themselves for default in payment of purchase-money, and later on resold them to other persons, they have not lost their right to enforce the judgment against the defendant.

Reading these two agreements, and especially having in mind the terms of the latter of them, which expressly declares that it and anything done under it shall not affect or prejudice either the plaintiffs or the defendant in respect of certain parts of the purchase-money therein specified, being the very moneys for which judgment was later on obtained against the defendant, I cannot reach any other conclusion than that the judgment was in respect of part of the purchase-money. I am, therefore, unable to admit the position contended for by the plaintiffs.

In the judgment of the Court of Appeal in this same action, *H. H. Vivian Co. Limited v. Clergue* (1908), 16 O.L.R. 372 (affirmed by the Supreme Court of Canada, *Clergue v. H. H. Vivian & Co.* (1909), 41 S.C.R. 607), this aspect of the case was considered and disposed of. The Chief Justice in his judgment, 16 O.L.R. at p. 379, says: "It is no hardship upon him" (the defendant) "to require him to perform the terms of his agreement. With his assent, the benefit of the agreement is now vested in the Standard Mining Company, subject to the question which has been determined in this action. If he now pays the amount he is found liable for, and is not repaid by the Standard Mining Company, he is not without remedy, for he acquires a lien upon the company's interest in the land to the extent of his payment." The Court there unhesitatingly treated the defend-

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ant as a purchaser and the moneys now sought to be realised as purchase-money. The plaintiffs, by retaking the lands and then disposing of them to third parties, have deprived the defendant of the benefit and the protection that should be his in the event of his being called upon to make payment; and they have, therefore, lost the right to enforce their judgment so far as it applies to the debt. To that extent the defendant's application succeeds.

The execution, so far as it is for costs, is in a different position. Following what was laid down by my brother Middleton in *McPherson v. United States Fidelity and Guaranty Co.*, *supra*, the plaintiffs are entitled to proceed on the execution with respect to these costs. On the 23rd September, 1914, the defendant tendered to the sheriff the full amount of the costs claimed under the execution, and interest thereon, acceptance of which was refused. The execution will, therefore, be withdrawn except in respect of these costs (including the costs of the issue and renewal of the execution) and interest thereon down to the date of the tender. The defendant is entitled to his costs of this application.

The plaintiffs appealed from the order of KELLY, J.

October 30. The appeal was heard by MEREDITH, C.J.O., FALCONBRIDGE, C.J.K.B., MAGEE and HODGINS, JJ.A.

A. H. F. Lefroy, K.C., for the appellants, contended that the cases relied upon by Kelly, J., had no application, because they were all cases between a vendor and a purchaser, proceeding upon the principle that a vendor of land cannot have both his land and the purchase-money, and that, therefore, if the vendor has cancelled the agreement or parted with the land, he cannot afterwards enforce any judgment for part of the purchase-money against the purchaser, because he is not in a position to convey the land to the purchaser, even if the latter pay up the whole of the purchase-money; that in this case the respondent ceased to be the purchaser after executing the agreement of the 10th March, 1905, and could now in no event be entitled to the land; that the agreement referred to was not an assignment of the original contract of sale to the respondent, but was a novation,

an entirely new contract of sale, in which the original contract of sale with the respondent was merged, and the Standard Mining Company of Algoma became the purchaser; that *cessante ratione cessat quoque lex*, and the cases relied on by Kelly, J., therefore, did not apply; that the agreement referred to specially reserved all the appellants' rights against Clergue for the first instalment which accrued due under his original purchase, and in respect to which the appellants obtained the judgment under which the writs in question were issued; that the agreement left the respondent primarily liable to the appellants as to the said first instalment and did not put him in the position of a surety for the Standard Mining Company of Algoma, even if, as between himself and that company, he might be looked upon as a surety; that as a matter of fact that company had never paid a dollar of purchase-money; that the agreement specially provided that nothing "done under" it should cancel the liability of the respondent to the appellants in respect to the said first instalment of his purchase-money under the original agreement; and that what the appellants had done in cancelling the new agreement with the company, after default in payment of four annual instalments, was "done under" an express clause in the said new agreement of the 10th March, 1905; therefore, by express provision, it did not do away with the liability of the respondent under the judgment in respect to which the writs had been issued; and that the contentions now raised by the defendant were *res adjudicata* against him already in this action: see the reports in 15 O.L.R. 280, 16 O.L.R. 372, and 41 S.C.R. 607.

G. F. Shepley, K.C., and *H. S. White*, for the defendant, the respondent. The position taken by the plaintiffs involves a palpable fallacy. It is quite true that, by the agreement between the plaintiffs, the defendant, and his assignee, which followed the assignment by the defendant to the Standard Mining Company of Algoma, all rights were reserved in respect of the proportion of the purchase-money then due, so that the defendant could not object to pay that proportion of the purchase-money; but, upon paying it, he would have become entitled to insist upon

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his assignee receiving the benefit of it as a payment on account of the purchase-money. The effect of the transfer to the Standard Mining Company of Algoma, followed by the agreement upon which the plaintiffs rely, was merely to retain what thereby became a sort of secondary obligation on the part of the defendant; but, whether it was primary or secondary, it was not made anything more than an obligation to pay purchase-money, involving a correlative obligation on the part of the plaintiffs to be ready to hand over the land when the purchase-money should be paid. This the plaintiffs are now unable to do, having parted with the land. The agreement which the plaintiffs rely on does not affect these correlative rights in any degree. We rely on the cases cited by KELLY, J.

November 27. The judgment of the Court was delivered by HODGINS, J.A.:—Appeal by the plaintiffs from the order of Kelly, J., of the 5th October, 1914, made in this action, declaring that the appellants are not entitled to enforce their judgment and execution against the respondent except as to costs.

The circumstances in which this judgment was recovered are set out in 16 O.L.R. 372 and 41 S.C.R. 607, where the facts are all detailed. The additional feature is that, since judgment was pronounced in the Supreme Court of Canada, the appellants have sold the mining property for \$75,000, after having forfeited it under a power in that behalf contained in the agreement of the 10th March, 1905, the terms of which are discussed in the reports already referred to.

Undoubtedly, prior to the act of forfeiture mentioned, if the respondent had paid the amounts for which judgment has been recovered, he would have paid them as the person originally liable for the purchase-money as purchaser of the mining property. The assignment of that agreement, according to the previous judgment, did not release him; in fact, the right to assert that he remained liable is expressly preserved in the assignment. So long as the same situation existed as formed the foundation of the judgment mentioned, the respondent's position did not differ from that of a mortgagor who, being liable on covenant to the

mortgagee, sells his lands to a third party. His conveyance does not prevent the mortgagee from holding him liable for the debt, and that notwithstanding that the mortgagee takes a covenant from the third party to pay it. But in the latter case the mortgagee is unable to enforce against the original mortgagor his covenant unless he is prepared to convey the property to him subject to the right of the third party. See *Kinnaird v. Trollope* (1889), 42 Ch. D. 610; *Stark v. Reid* (1895), 26 O.R. 257.

The sole question here is: does the forfeiture under the agreement of the 10th March, 1905, and the sale pursuant thereto, work such a destruction of the appellants' right against the respondent as disables them from further pursuing him in respect to the debt? The argument is, that the forfeiture and sale were something done under the agreement, and that it was expressly agreed therein, *inter alia*, that "this agreement and anything that may be done hereunder shall not affect or prejudice" the appellants' claim in respect of the \$24,000, and part of the subsequent instalment, *i.e.*, the sum for which judgment was recovered in this action, nor shall it prejudice the rights of the respondent with respect thereto.

But that clause concludes in a way which indicates that it was meant to preserve those rights during a period in which it was open to the purchaser to pay the instalment, and for which, if the respondent pays, he obtains a lien. The final words in the clause in question are: "But until the purchaser shall pay the first two instalments of \$24,000 each, with interest as aforesaid, the rights of the vendors and the party of the third part shall remain as they now are in respect of said instalments and interest." This is supported by the provision, found later on, that all moneys paid under the agreement were in the first place to be applied (after paying an earlier judgment) "in and to the discharge of the claims of the vendors against the party . . . of the third part in respect of which their rights have been hereinbefore reserved."

It appears from the notice of forfeiture that, unless within one month the overdue instalments were paid, the appellants

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intended to forfeit the agreement and any moneys paid thereunder, and that the said agreement was to become null and void. The forfeiture was carried out about July, 1909, owing to default not only on subsequent instalments, but on account of the instalment for which judgment had been recovered in 1907; and the property was sold on the 4th July, 1912.

The forfeiture deprived the purchasers of the right to make payment and demand the property. Treating the liability of the respondent as having continued down to that time, and his right as one requiring the payments by the purchaser to be applied in discharge of that liability, and it appearing that the rights and liabilities of the parties to this appeal were preserved expressly until payment of the first two instalments, it seems to follow that the forfeiture worked a serious change in the rights of the respondent. The appellants themselves put an end to the situation during which their rights against the respondent were preserved, and, by precluding payment by the person primarily liable, rendered the protection provided by the agreement to the respondent of no value.

Such a radical change as putting an end to the agreement itself, and therefore to all its provisions, does not seem to come within the true meaning of the words "anything that may be done hereunder," notwithstanding that they may seem literally applicable. Retention of the rights now set up ought to be clearly and definitely expressed: *Arnold v. Playter* (1892), 22 O.R. 608.

Upon the best consideration that I can give to the argument of Mr. Lefroy, I think that the true intent and meaning of the agreement was, that the respondent should remain liable, notwithstanding the assignment, for the moneys due by him before, but that otherwise the old agreement was merged in the later one, and that the respondent, when sued upon that old liability, was entitled to rely upon the merger as having changed his position from that of a simple purchaser to that of surety, *quoad* the land, for the purchase-money: *Muttlebury v. Taylor* (1892), 22 O.R. 312.

There is a further ground upon which the judgment in

appeal may be supported, namely, that the effect of the agreement between the appellants, the Standard Mining Company of Algoma Limited, and the respondent, was merely to substitute for the respondent that company as the purchaser of the property, and to relieve the respondent from his obligation to purchase, but not from his liability to pay the overdue instalments of the purchase-money, the amount of which paid by the respondent was to be credited upon the purchase-money. In either view, the principle of the cases referred to by my brother Kelly is applicable.

Appeal dismissed with costs.

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Bank—Winding-up before Commencement of Business—Contributories — Subscribers for Shares—Allotment by Provisional Directors—Implied Powers—Membership in Banking Corporation—Liability of Members to Contribute to Expenses—Adjustment inter se—Winding-up Act, R.S.C. 1906, ch. 144, secs. 2 (g), 51, 60, 93—Bank Act, R.S.C. 1906, ch. 29, secs. 11, 12, 13, 20, 34.

The bank was incorporated on the 20th July, 1905, by the Dominion statute 4 & 5 Edw. VII. ch. 125; it never secured subscriptions for the amount of capital stock necessary to enable it to obtain the certificate of the Treasury Board to begin business; and a winding-up order was made on the 29th May, 1908. The four appellants, among others, signed applications under seal for shares, and promised to pay, in instalments, \$125 for each share of \$100 which the provisional directors might allot to them. To each of the appellants shares were allotted: one of them paid in full, one paid nothing, and the other two each paid part of the price:—

Held, that the provisional directors had power to allot shares and to make the subscribers members of the corporation; and the names of all the appellants were properly placed upon the list of contributories in the winding-up—although they never became “shareholders;” there being no question of double liability, the name of the appellant who had paid in full was placed upon the list in order that he might receive what he had paid over and above his proper share.

Sections 2 (g), 51, 60, and 93 of the Winding-up Act, R.S.C. 1906, ch. 144, and secs. 11, 12, 13, 20, and 34 of the Bank Act, R.S.C. 1906, ch. 29, considered.

The rule as to implied powers—that where a certain result is authorised to be attained, and the means are not clearly indicated, the power of doing all such acts, or employing such means, as are necessary to its execution, is impliedly granted—applied.

Judgment of MIDDLETON, J., affirmed.

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APPEAL by four persons, whose names were placed by an Official Referee upon the list of contributories in the winding-up of the bank, from an order of MIDDLETON, J., dismissing an appeal from the Referee's order so placing their names.

October 20. The appeal was heard by MEREDITH, C.J.O., GARROW, MACLAREN, and MAGEE, JJ.A.

W. M. Douglas, K.C., for the appellants. The appellants were only subscribers, and never became shareholders. Therefore, they cannot be made contributories. Section 51 of the Winding-up Act, R.S.C. 1906, ch. 144, is the only authority for putting the names of persons on the list, and it says "shareholder." As dealing with contributories, see secs. 48, 60, and 93. The definition of "contributory" is given in sec. 2 (g). The only powers and duties of provisional directors under the Bank Act which are expressly conferred and imposed are contained in secs. 12 and 13: *Re Monarch Bank of Canada* (1910), 22 O.L.R. 516.

C. A. Masten, K.C., and W. K. Fraser, for the liquidator, the respondent. The question here is one of procedure only. The provisional directors allotted shares to these subscribers, and they had power to do so: *MacLaren on Banks and Banking*, 3rd ed., p. 20; *Monarch Life Assurance Co. v. Brophy* (1907), 14 O.L.R. 1, at p. 14; *Lake Superior Navigation Co. v. Morrison* (1872), 22 U.C.C.P. 217, at p. 220; *In re London Marine Insurance Association* (1869), L.R. 8 Eq. 176; *In re Arthur Average Association* (1876), 3 Ch. D. 522. When authority is given to effectuate a main purpose, things which are incidental to it may and ought to follow from the authority for effectuating the main purpose: *Small v. Smith* (1884), 10 App. Cas. 119, at p. 129. Though these persons are called subscribers in the Act, yet when the stock is allotted them, they become shareholders in fact, and are contributories: *Lindley on the Law of Companies*, 6th ed., pp. 634, 635; *In re London Speaker Printing Co.* (1889), 16 A.R. 508, at p. 513. Besides, these subscriptions are under seal: *Nelson Coke and Gas Co. v. Pellatt* (1902), 4 O.L.R. 481. The list of contributories is not confined to shareholders: R.S.C. 1906, ch. 144, sec. 2 (g); *Halsbury's Laws of*

England, vol. 5, para. 655; Buckley's Companies Acts, 9th ed., pp. 291, 321, 322.

Douglas, in reply.

November 27. The judgment of the Court was delivered by MACLAREN, J.A.:—This is an appeal by four subscribers for shares in the Monarch Bank from a judgment of Middleton, J., affirming the order of the Official Referee which placed the appellants on the list of contributories in the winding-up of the said bank.

The bank was incorporated on the 20th July, 1905, by ch. 125 of the Dominion statutes of that year (4 & 5 Edw. VII.), which is in the short form prescribed by schedule B of the Bank Act, R.S.C. 1906, ch. 29. The bank not having secured within a year the \$500,000 stock necessary to enable it to obtain the certificate of the Treasury Board to begin business, the time was extended to the 20th July, 1907, by ch. 127 of the Dominion statutes of 1906 (6 Edw. VII.); default still continuing, a winding-up order was taken out and a liquidator named on the 29th May, 1908.

Mr. Douglas based his appeal on the ground that the appellants never became shareholders, and consequently could not be made contributories.

The four appellants, Murphy, Choat, Foster, and Beasley, signed separate applications under seal for 30, 5, 3, and 32 shares respectively, promising to pay \$125 in certain instalments for each share of \$100 which the provisional directors might allot to them. The whole number were allotted, and the parties notified. All the instalments were payable before the charter expired on the 20th July, 1907. Murphy paid no cash, but gave a demand note, bearing interest, for the full amount, \$3,750; Choat paid \$125, and gave a note for \$500; Foster paid up in full, \$375; and Beasley paid \$800, and owed \$3,200.

These four claims were selected as typical of the different classes of subscribers to the stock of the bank; and, by the direction of the Official Referee, they were consolidated in one test case in order to equalise the position of the different subscribers *inter se* with reference to their contributing to the preliminary

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expenses of the bank, so that those who had paid nothing or less than their share might be compelled to contribute, and those who had paid more than their share might be recouped.

Mr. Douglas contended that the appellants, not being shareholders, were consequently not liable to be placed upon the list of contributories, even though they might each be liable in an action brought against them to recover their proper shares of the preliminary expenses of the bank. He referred to sec. 51 of the Winding-up Act, R.S.C. 1906, ch. 144, as the only section under which it could be claimed that they should be placed upon the list. It reads as follows: "Every shareholder or member of the company or his representative shall be liable to contribute the amount unpaid on his shares of the capital, or on his liability to the company, or to its members or creditors, as the case may be, under the Act, charter or instrument of incorporation of the company, or otherwise. 2. The amount which he is liable to contribute shall be deemed an asset of the company, and a debt due to the company, payable as directed or appointed under this Act."

The word "contributory" in the Winding-up Act, R.S.C. 1906, ch. 144, is defined in sec. 2(g) as follows: "'contributory' means a person liable to contribute to the assets of a company under this Act; and, in all proceedings for determining the persons who are to be deemed contributories and in all proceedings prior to the final determination of such persons, it includes any person alleged to be a contributory."

Section 60 provides that "the Court shall adjust the rights of the contributories among themselves;" and sec. 93, that "the Court shall distribute among the persons entitled thereto any surplus that remains after satisfaction of the debts and liabilities of the company, and the winding-up charges, costs and expenses, and unless otherwise provided by law or by the Act, charter or instrument of incorporation, any property or assets remaining after such satisfaction shall be distributed among the members or shareholders according to their rights and interests in the company."

It is quite true that the word "shareholder" is not used in the Bank Act until a later stage in the history of a bank than

that attained by the Monarch Bank. The term used in the preliminary stage is "subscribers." And yet there is no magic in the mere name; one should look at the real substance of the matter. On the 20th July, 1905, by ch. 125 of the statutes of that year, the six persons named as provisional directors were constituted a corporation. In addition to the powers conferred upon them in the Bank Act, they had, by virtue of their incorporation, those conferred by the Interpretation Act, R.S.C. 1906, ch. 1, sec. 30, such as the "power to sue and be sued, to contract and be contracted with by their corporate name, . . . to acquire and hold personal property," etc. Their special Act provides that later the corporation shall be composed of the six persons named and "such others as become shareholders in the corporation."

The Bank Act, R.S.C. 1906, ch. 29, sec. 13, provides that at the first meeting of subscribers they shall *inter alia* elect directors, and thereupon (sub-sec. 4) "the functions of the provisional directors shall cease."

Now, if the theory of the appellants be correct, the corporation could not possibly be composed as the Act says it shall be, as the subscribers, according to that view, would not become shareholders until after the provisional directors had ceased to exist as such.

Again, sec. 20 of the Bank Act provides that no person shall be elected a director at such meeting unless he hold stock on which \$3,000 or more has been paid-up. If he holds such stock, he is surely a stockholder or shareholder within the meaning of the Act, and every other subscriber who has been allotted stock by the provisional directors is in the same position.

The Bank Act, as it stood while the charter of the Monarch Bank was in force, contained singularly few provisions as to the powers and duties of provisional directors. The provisions are all, practically, comprised in secs. 11, 12, and 13. The provisional directors are appointed "for the purpose of organising the bank," and are authorised to cause stock-books to be opened at the head office and elsewhere at their discretion, and to keep them open as long as they deem necessary. As soon as \$500,000 has been subscribed, and \$250,-

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000 paid thereon and remitted to the Finance Minister, they may by public notice call a meeting of the subscribers, at which they shall fix the date of the annual meeting, determine the number of directors (not less than five), and elect these from the qualified subscribers. For anything that appears in the Act, these six provisional directors, or any five of them, might, if they were financially able and so chose, subscribe the whole \$500,000, paying \$250,000, and elect themselves directors. Of course, banks are not organised in this way; but it shews what power has been put into the hands of the provisional directors and how much is left to their discretion.

This would seem to be pre-eminently a case for the application of the rule or maxim as to implied powers, viz., that where a certain result is authorised to be attained, and the means are not clearly indicated, the power of doing all such acts, or employing such means, as are necessary to its execution, is impliedly granted.

On this point Lord Chancellor Selborne said in *Small v. Smith*, 10 App. Cas. 119, at p. 129: "I entirely adhere to what was said in . . . *Attorney-General v. Great Eastern R.W. Co.* (1880), 5 App. Cas. 473, that when you have got a main purpose expressed, and ample authority given to effectuate that main purpose, things which are incidental to it, and which may reasonably and properly be done and against which no express prohibition is found, may and ought, *primâ facie*, to follow from the authority for effectuating the main purpose by proper and legal means. . . . We must ascertain first of all what the main purpose here is, then what are the general powers of the directors, then what are their special powers, and then, supposing that this is not within the natural meaning either of their general powers or of their special powers, whether it can be brought in as incidental to the main purpose and a thing reasonably to be done for effectuating it."

It is not necessary in the present case to go so far as above indicated, because the usual procedure for the organisation of a joint stock company is so well understood. In my opinion, what is declared in sec. 12 of the Bank Act to be the purpose of that portion of the Act, and which is authorised to be done in sec.

13, could not properly be carried out unless the directors had power to allot stock and to make the subscribers members of the corporation. Does not the right to choose the directors of the bank of itself imply that they are members?

It is also worthy of note that there is nothing in the Act to suggest that the directors have any right to interfere with the list of subscribers or shareholders prepared by the provisional directors for the first meeting, or that they require to do something in order to change subscribers into shareholders. Indeed, their power over the original stock of the bank is very circumscribed. They have no power over it except such portion as may not have been subscribed, and even this they must allot *pro ratâ* to the existing shareholders, that is, to the original subscribers and their transferees: sec. 34.

Sections 60 and 93 of the Winding-up Act would appear to have been designed to meet such a contingency as has arisen in this case, and they appear to have been admirably adapted to do justice to all parties.

The appellant Foster was properly placed upon the list of contributories, although he had paid for his shares in full, and there is no question of double liability: *In re Anglesea Colliery Co.* (1866), L.R. 1 Ch. 555. He is placed on the list simply in order that he may receive what he has paid, over and above his proper share, in accordance with secs. 60 and 93 of the Act; and I fail to see why he appeals.

In my opinion, the appeal should be dismissed.

Appeal dismissed with costs.

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[APPELLATE DIVISION.]

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COLLIER v. CITY OF HAMILTON.

Master and Servant—Injury to Servant of Municipal Corporation—Explosion of Gas—Duty to Take Reasonable Care—Evidence—Negligence—Res Ipsa Loquitur—Nonsuit.

The plaintiff, who was employed as a labourer by the defendant, a city corporation, was injured by an explosion of gas in a concrete chamber, which he had entered by the order of his foreman. The chamber was under the pavement of a city street, and had no opening into it except the man-hole by which the plaintiff entered. There was no gas-main in the neighbourhood of the chamber; there was no evidence of any defect in it; it was shewn that no accident of any kind had happened in connection with this chamber or any similar ones, of which there were many, in the city; and there was nothing to indicate the nature of the gas which exploded or to prove whence it came. In an action to recover damages for the plaintiff's injuries, it was contended that the rule of evidence *res ipsa loquitur* applied:—

Held, that the utmost duty of the defendant corporation was to take reasonable care to provide proper appliances, and to maintain them in a proper condition, and so to carry on its operations as not to subject those employed by it to unnecessary risk; and there was nothing to warrant the conclusion that the defendant corporation neglected that duty and that the plaintiff's injuries were occasioned by the neglect of it.

Smith v. Baker & Sons, [1891] A.C. 325, 362, applied.

McArthur v. Dominion Cartridge Co., [1905] A.C. 72, and *Winnipeg Electric R.W. Co. v. Schwartz* (1913), 49 S.C.R. 80, distinguished.

Judgment of nonsuit entered by the Senior Judge of the County Court of the County of Wentworth, affirmed.

APPEAL by the plaintiff from the judgment of the Senior Judge of the County Court of the County of Wentworth withdrawing the case from the jury and dismissing the action (brought in that Court) at the close of the plaintiff's case.

The action was brought to recover damages for injuries sustained by the plaintiff owing, as he alleged, to the negligence of the defendant, the Corporation of the City of Hamilton.

The plaintiff was employed by the defendant corporation as a labourer in its waterworks department, and, by the direction of his foreman, went to a concrete chamber on the corner of Cannon street and Belmont avenue, through which a 30-inch water-main ran, for the purpose of removing from it some lumber. The chamber was below the level of the street, and the entrance to it was by a man-hole. The cover of the man-hole was taken off, and the plaintiff descended into the chambers. Being unable to see about him, owing to the insufficiency of the

light, the plaintiff lighted a match, which went out; he then lighted another match, when an explosion occurred, and the plaintiff was somewhat severely burned. This action was brought to recover damages for his injuries; and his appeal was from the judgment dismissing it.

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November 12. The appeal was heard by MEREDITH, C.J.O., MACLAREN and HODGINS, JJ.A., and CLUTE, J.

C. W. Bell, for the appellant. The jury should have been allowed to say whether there was negligence on the part of the defendant corporation, respondent. The rule *res ipsa loquitur* applies, and puts the corporation on its defence. If the corporation had provided proper appliances and kept them in proper condition so as not to subject the appellant to unnecessary risk, the accident would not have happened: *Smith v. Baker & Sons*, [1891] A.C. 325. Though there was no exact proof that the gas got into the chamber from the main of the third party, yet gas was in the chamber, and there must have been some fault in the walls of the chamber to let it in: *McArthur v. Dominion Cartridge Co.*, [1905] A.C. 72; *Winnipeg Electric R.W. Co. v. Schwartz* (1913), 49 S.C.R. 80.

F. R. Waddell, K.C., for the defendant corporation, respondent. The appellant was rightly nonsuited. There was no defect in the concrete chamber, nor any gas-main in proximity to it. Therefore, there was nothing to indicate that gas might get into the chamber, so as to saddle the city corporation with want of reasonable care. There are many of these chambers in the city, but no such accident ever occurred before. Therefore, the cases cited by the appellant do not apply.

S. F. Washington, K.C., for the third party, respondent. There is nothing to shew that the gas came from the main of the third party.

November 27. The judgment of the Court was delivered by MEREDITH, C.J.O.:—This is an appeal by the plaintiff from the judgment of the County Court of the County of Wentworth dated the 9th September, 1914, which was directed to be entered

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by the Senior Judge of that Court, after the trial of the action before him, sitting with a jury, on that and the previous day.

The action is brought to recover damages for injuries sustained by the appellant owing, as he alleges, to the negligence of the respondent the Corporation of the City of Hamilton.

The appellant was employed by the corporation as a labourer in its waterworks department, and by the direction of his foreman went to a concrete chamber on the corner of Cannon street and Belmont avenue, through which a 30-inch water-main ran, for the purpose of removing from it some lumber that, as I gather from the evidence, had been used in the construction of the chamber; the chamber is below the level of the street, and the entrance to it is by a man-hole. The cover of the man-hole was taken off, and the appellant descended through the man-hole into the chamber. Being unable to see about him, owing to the insufficiency of the light, the appellant lighted a match to enable him to do so, and the light of the match went out, and he then lighted another match, when an explosion occurred, and he was somewhat severely burned; and it is for the injuries sustained that the action is brought.

No evidence was given of any defect in the concrete chamber, which was, as I understand it, watertight, and, as far as appeared from the evidence, with no opening into it except by the man-hole. There was no evidence of there being any gas-main in proximity to the chamber, and from the affidavits that have been filed upon the motion there was none within a block of it.

At the close of the appellant's case, the learned Judge ruled that there was no evidence to go to the jury, and directed judgment to be entered dismissing the action.

At the trial and upon the argument before us the appellant contended that the maxim *res ipsa loquitur* applies, and that the case made at the trial was sufficient to call for an answer from the respondent corporation.

The highest ground upon which the appellant's case can be rested is, that it was the duty of the respondent corporation to take reasonable care to provide proper appliances, and to maintain them in a proper condition, and so to carry on its operations as not to subject those employed by it to unnecessary risk: *per*

Lord Herschell in *Smith v. Baker & Sons*, [1891] A.C. 325, 362; that the respondent corporation neglected that duty; and that his injuries were occasioned by the neglect of it.

No case was made which would warrant that conclusion being reached; there was no evidence that this reasonable care was not taken. There was nothing to warrant the conclusion that the gas which escaped came from the mains of the third party, and, as I have said, it is now shewn that the nearest gas-main was a block distant from the concrete chamber; and there was, therefore, no reason to anticipate that gas from that source would or might enter the chamber; and, in addition to this, there was nothing to indicate that there was any opening in the walls or floor of the chamber through which, if gas were present in the soil owing to an escape from the main, it could enter.

Had it been shewn that there were gas-mains near the chamber, it may be that the jury might have drawn the inference that it was the escaping gas which was ignited, and possibly have inferred, in the absence of any evidence to the contrary, that it entered the chamber through some opening that had been left in its walls or floor.

If such a case had been made, such cases as *McArthur v. Dominion Cartridge Co.*, [1905] A.C. 72, might have been applicable. In that case the *ratio decidendi* was, that the facts in evidence warranted the jury in drawing the inference, though there was no direct evidence to shew how the explosion which caused the injury occurred, that it was due to the defective operation of an automatic machine used for filling shells or cartridges with powder and shot at or in connection with which the injured man was working, and an important factor was that the machine occasionally acted in an uncertain not to say in an erratic manner. There was, therefore, ground for the inference that the jury drew, and, as Lord Macnaghten pointed out (p. 76), it was "not an unreasonable inference from the facts proved that in one of these blows" (*i.e.*, of the machine) "that failed a percussion cap was ignited and so caused the explosion. There was no other reasonable explanation of the mishap when once it was established to the satisfaction of the jury that the injury was not owing to any negligence or carelessness on the part of the

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operator." And it was on the same principle that *Winnipeg Electric R.W. Co. v. Schwartz*, 49 S.C.R. 80, was decided.

In the case at bar there was no evidence of any defect in the concrete chamber, and it was shewn that, although there were many of these chambers in the city's streets, no accident of the kind, or indeed of any kind, had happened in connection with any of them, nor was there anything to indicate the nature of the gas which exploded or to prove from whence it came.

The result is, that, in our opinion, the ruling complained of was right, and the appeal must be dismissed with costs.

[APPELLATE DIVISION.]

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April 6.
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Title to Land—Devise—Revocation of Will by Marriage—Void Marriage by Reason of Previous Marriage—Proof of Previous Marriage—Testimony of First Wife—Sufficiency—De Facto Marriage—Presumption from Co-habitation—Proof of Death of Testatrix—Presumption from Grant of Probate—Onus—Jurisdiction of Surrogate Court—Presumption of Continuance of Life—Presumption of Fact—Judicature Act, R.S.O. 1897, ch. 51, sec. 38—Conveyance under Power of Attorney—Alteration of Sealed Instrument—Presumption as to Time of Making—Rebuttal—Evidence Act, R.S.O. 1914, ch. 76, sec. 46—Production of Copy of Instrument—Possession of Land—Mesné Profits—Waste—Improvements—Set-off—Costs.

The plaintiff, as executrix and sole devisee under the will of G., called "the testatrix," sought to recover possession of land in Ontario owned by the testatrix, to which the defendant claimed title under a conveyance alleged to have been made to him by the testatrix, in fact executed in her name by her attorney, J., with whom she had lived as his wife after going through a marriage ceremony with him. The conveyance was dated the 8th December, 1906; the will was dated the 15th January, 1897, and was admitted to probate by a Surrogate Court on the 18th November, 1911; the marriage ceremony was in June, 1905; the power of attorney under which J. purported to act was dated the 27th September, 1905; and the date of the death of the testatrix, as stated in the letters probate, was the 31st October, 1905. It was proved by the testimony of another woman that she had gone through a ceremony of marriage with J. in 1903, and that they afterwards lived together and believed themselves to be man and wife. She also testified that she had been informed that no marriage license was ever issued for the marriage, and that no trace could be found in the place where the ceremony took place of a minister bearing the name claimed by the man who performed the ceremony, and who professed to be a minister:—

Held, that this evidence was sufficient to prove the previous marriage of J.; and, therefore, the marriage of the testatrix to J. was no marriage, his first wife being alive, and the will under which the plaintiff claimed was not revoked by the marriage of the testatrix.

Except in cases of bigamy and actions for criminal conversation there is a strong presumption in favour of the validity of a marriage proved to have been celebrated *de facto*; and mere cohabitation may suffice to raise a presumption of valid marriage.

The probate of a will is conclusive until revoked, and no Court of law can admit evidence to impeach it: *Allen v. Dundas* (1789), 3 T.R. 125. This proposition is not in its entirety applicable in Ontario because by the Judicature Act, R.S.O. 1897, ch. 51, sec. 38, the Supreme Court has jurisdiction to try the validity of wills, whether probate has been granted or not.

The onus of establishing want of jurisdiction upon the ground that the testatrix was alive when probate was granted was upon the defendant; and in this he failed.

There is no presumption of law as to the continuance of life, though an inference of fact may legitimately be drawn that a person alive and in health at a certain time was alive a short time after. Whether such an inference should be drawn depends upon the particular facts of the case in which the question arises; and the facts in this case did not warrant the inference that the testatrix was alive at any time later than the beginning of 1906, but rather justified the inference that she was then dead. The presumption of death, not as a matter of law but as a matter of fact, may arise; and this although seven years from the time the person was last heard of have not elapsed.

In the Goods of Matthews. [1898] P. 17, and *In the Goods of Winstone*, *ib.* 143, referred to.

And *held*, upon the evidence, that the power of attorney as drawn and executed by the testatrix did not contain any provision authorising J. to deal with lands in Canada, but was limited to lands in Alaska; and the provision extending his authority to lands in Canada was subsequently added.

It is to be presumed that alterations appearing in a deed were made before it was executed, but it is not the law that where that presumption has been rebutted by proof to the contrary there is still a presumption that the alterations were made with the assent of the grantor.

The *prima facie* evidence of the original which is afforded by the production of a copy of the instrument certified as sec. 46 of the Evidence Act, R.S.O. 1914, ch. 76, provides, is rebutted by the evidence which rebuts the presumption above referred to.

Held, therefore, that the plaintiff was entitled to judgment for the recovery of possession of the land, but not for the recovery of mesne profits or damages for the cutting of timber, the claims for which were offset by the value of the improvements which the defendant had made.

Held, also, that, as the defendant had bought and paid for the land in good faith, believing that J. had authority to sell and convey to him, there should be no costs.

Judgment of LENNOX, J., reversed.

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ACTION by Christina Catherine Hedge, the executrix and sole devisee under the last will and testament of Isabella Margaret Gilchrist, deceased, for the recovery of possession of the west half of lot lettered A in the 6th concession of the township of Roxborough, in the county of Stormont, except the part of the lot owned by the Canada Atlantic Railway Company, and for mesne profits and damages for the cutting and removal of wood and timber from the land.

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November 18, 1913. The action was tried before LENNOX, J., without a jury, at Cornwall.

G. A. Stiles, for the plaintiff.

D. B. Maclellan, K.C., for the defendant.

February 17, 1914. LENNOX, J.:—Isabella Margaret Gilchrist was lawfully married to Lehonduus Johnston, commonly called Lee H. Johnston, at Nome, in the district of Alaska, on the 15th June, 1905. The plaintiff admits that a marriage was in fact duly solemnised between these parties and that they afterwards lived together as man and wife, but contends that at the time of the ceremony Johnston could not contract a lawful marriage with Isabella Margaret Gilchrist, as he had previously married Cora Tosh, who was then and is still alive. It would be sufficient to say that there is no evidence of a previous marriage, but I may add that the evidence of Cora Tosh and Mr. Warren makes it clear that, whatever deception may have been practised upon the woman, she was not legally married to Johnston, and she does not now claim or think that she was.

The defendant obtained what purported to be a conveyance of the land in question from the owner in good faith, and paid for it the sum of \$2,700 in cash on the 8th December, 1906. At that time the defendant was in possession of the land as tenant, and has remained in possession as owner. He should not be disturbed until the plaintiff has clearly established her title. In consideration of the purchase, the rent for the part of the current year which had elapsed was abated; and I find that, with this abatement counted, the \$2,700 paid by the defendant was the full and fair value of the property at that time.

The plaintiff alleges that the power of attorney under which Lee H. Johnston purported to execute the deed to the defendant was a forgery, in so far as it refers to land in Canada, and that in any case it was revoked by the death of Isabella Margaret Gilchrist Johnston before the execution of the defendant's deed.

I think there is evidence to support the allegation of forgery. I am not satisfied that the authorities referred to by the defendant's counsel meet this case. It is easy enough to argue that crime is not to be, and good faith is to be, presumed, where there

is nothing more than the fact that an alteration appears upon the face of an instrument without explanation; but here there is, to my mind, the clearest evidence that, at the time this power of attorney was executed and registered, there was no provision in it for sale of land in Canada. It is argued that, if she subsequently authorised or consented to the additional clause, this would be sufficient in law. Possibly it would. The difficulty I have is with the question of fact. I cannot find any evidence that this was done with Mrs. Johnston's knowledge or approval. It is a question, however, upon which an appellate Court will have the same means of forming an opinion that I have. If I have come to a proper conclusion upon this point, the question of revocation by death is of no importance.

There is, perhaps, no evidence upon which I could find as a matter of fact that Isabella Margaret Gilchrist Johnston is dead. The statements attributed to Johnston after he was arrested may or may not have been made, and if made may or may not be true; but in any event they are not evidence of his wife's death at a particular time or of his wife's death at any time. Even with the assistance of the presumption which has arisen since, through lapse of time, and drawing any inference which I may be justified in drawing from the discovery of the remains of a human being in the fall of 1908, I cannot find that there is any evidence that Mrs. Johnston was dead when the deed was executed—in December, 1906. Those who allege death at a particular time or before a specific event must prove it: *In re Lewes' Trusts* (1871), L.R. 6 Ch. 356; Phipson on Evidence, 4th ed., pp. 626-7; Taylor on Evidence, 9th ed., cases collected in paras. 198 to 202; *Thompson's Trusts* (1905), 39 Ir. L.T.J. 372.

But Mrs. Johnston's relatives were in the habit of writing to her and receiving letters from her from time to time. How frequently was not stated. The last communication from Mrs. Johnston, in her own handwriting, was in October, 1905. I have no faith in the letters written by the husband's "nephew" or the typewritten letters. It was not stated in evidence, that I remember, whether Mrs. Johnson was known to be rheumatic. There is no evidence of any person seeing Mrs. Johnston later than towards the end of 1905—but there is amazingly little evidence

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of any kind upon this point. For the purpose of dealing with her estate, seven years' unexplained absence and silence raises an inference of death of which the next of kin can avail themselves. Of course, in the absence of actual evidence of death, they must wait the full seven years. The inference may be always growing or ripening, but it is never ripe until every moment of the seven years has run. Until then the answer, whether early or late in the period, is the same: "Wait, she may yet be heard of, she may be yet alive." No one can administer, then, until the seven years have gone by; the three years during which the personal representative retains the estate begin at the end of the seven years; and at the end of this period, subject to statutory exceptions, the estate vests in the heirs at law.

The plaintiff claims the property in question as devisee of her sister Mrs. Johnston under a will dated and executed on the 15th December, 1897; and she commenced this action on the 14th March, 1912. At that time, her sister had been lost track of for something over six years. Lee H. Johnston had also disappeared and not been heard of since the autumn of 1908. The officials who are blameable for his escape from custody suggest, argue in fact, that he must be dead. There is no evidence that he is dead, and of course no presumption that he is dead has yet arisen. I have no idea that he committed suicide. The preparations were not of the class to facilitate drowning—manacles and handcuffs would have been aids to such end; but getting rid of them was the promise and initial stage of freedom. He escaped where the waters were narrowest, and a friendly boat would be within easy reach of shore. I am very far from sure that the last has been heard of Mr. Johnston. At all events if either side desired to establish Johnston's death—and I am not sure that either party did—I have only to say that what has been shewn does not satisfy me that he is dead.

Coming back, then, to the plaintiff's claim as devisee. The will was revoked by the marriage of the testatrix on the 15th June, 1905, as above stated, and the plaintiff fails.

Alternatively, the plaintiff claims as an heiress at law and as assignee of four other heirs and heiresses at law of her sister;

and if, as I have found, he cannot protect himself as a *bonâ fide* purchaser for value under the power of attorney, the defendant claims that he is at all events entitled to hold the one-half share of the property which descended to Lee H. Johnston from his wife; and to this the plaintiff rejoins that Johnston did not inherit anything, because, as the plaintiff alleges, he murdered his wife. I will dispose of this last point at once. There were a lot of newspaper clippings deposited with the exhibits. I am prepared to assume that they make out a clear case against somebody. I have not opened the envelopes containing them. Whether there is good ground for suspicion or not I do not know, but this much is clear that there is no evidence whatever that Johnston murdered his wife—if in fact she is dead. On the contrary, a statement attributed to Johnston—most improperly insisted upon and elicited by the plaintiff's counsel, one of a long list of transgressions of this kind—if it were evidence at all, but it is not, would establish that Mrs. Johnston died by her own hand. (Warren's evidence.)

Accepting and acting upon the presumption of Mrs. Johnston's death, I find and declare that when the property is administered in Canada the defendant will be entitled to be allowed one-half the value of the farm—to be increased or decreased by rent, improvements, and other items of account.

What is the position of the plaintiff? On the facts as they are in evidence before me, she was not entitled to either probate or administration at the time she issued the writ. As it turns out, she was not entitled to a grant of probate at all, and the sealing in Ontario, if desired, will be annulled. It is true that, contrary to the view at one time entertained, it is sufficient now if administration is procured before the case comes on for trial: *Trice v. Robinson* (1888), 16 O.R. 433; and *Dini v. Fauquier* (1904), 8 O.L.R. 712, where the cases are discussed. And, when granted, the administration relates back to the date of the death: *In the Goods of Pryse*, [1904] P. 301. And where steps have been taken promptly and administration applied for, the Court may even grant an injunction so as to preserve the property until administration can be obtained, as was done, at the instance of the sole heir at law, in *Cassidy v. Foley*, [1904] 2 I.R.

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427. But here administration has not even been applied for, and the plaintiff has been fighting against the suggestion of intestacy. Two of the heirs at law are not before the Court, but this in itself is not a serious objection. The other questions are; and the plaintiff is not in a position to maintain this action.

But, on the other hand, further litigation should be avoided if possible. To dismiss the action is not going to benefit the defendant in the end. The parties should get together, and, with or without my assistance, come to a settlement. In the interest of all parties, a reference and judicial sale should be avoided.

If the two outstanding shares can be got in—the defendant's title confirmed—and he pays to the plaintiff and other parties entitled one-half the value of this part of the estate, the rent and improvements being taken into account, that is what will yield the best net result for all parties concerned. If the two shares cannot be got in, the matter is not so simple; but, by administration, or in some other way, the difficulty can be met. If an adjustment along these lines should be come to, it would be a case of divided success, and the usual result should follow—each party should bear his and her own costs. Even if I should conclude to find for the plaintiff, in the action as it is, in proportion to the five-sevenths of one-half which she appears to represent—either with or without amendment or administration—the costs would be disposed of, I think, in about this way.

I have gone into this matter fully so that parties may know just about what to expect. I will hear counsel upon any point in connection with a settlement or determine any question in that connection if they desire it; but it will be better still if the counsel and parties can settle it themselves.

If no arrangement is come to, the view I entertain at present is that the action should be dismissed; but I shall be glad to have it pointed out that this need not, or should not, be done. If I dismiss the action, unless the failure to settle is owing to the unreasonable attitude of the defendant, I shall probably dismiss it with costs. But, if I am compelled to do this, in the end it will be a loss to both the plaintiff and defendant.

April 6. LENNOX, J.:—Counsel have not been able to agree upon a settlement. The plaintiff does not propose to take out

administration, and does not ask to add parties or amend. The lasting improvements made upon the property would be about equal to the value of the timber taken off, and I set off the one against the other. As I have already found, \$2,700 was a fair value for the property at the time the defendant purchased it. I have come to the conclusion that the actual value of the farm is now \$3,000. The defendant is chargeable with \$800 for rent, making a total to be accounted for of \$3,800. The plaintiff is now in a position to get in the two outstanding shares; and, having done this, she and the defendant would each have an undivided half interest in the farm and rent, or what is equal to an interest of \$1,900 each: and this action should be settled upon this basis. The costs of administration and a judicial sale of the property should be avoided.

1. If, then, the defendant, within 15 days from this date, notifies the plaintiff or her solicitor that he is willing and prepared to pay the plaintiff the sum of \$1,900 upon the execution and delivery to him of a conveyance and assignment of all the estate, interest, and claim of all the heirs and heiresses at law and next of kin of Isabella Margaret Gilchrist, afterwards Johnston, in the land in question, and in and to their share of rent, and if, within 30 days after the giving of such notice, or such further time as I or any Judge of this Court may hereafter, upon application, allow, the plaintiff executes and tenders and, upon payment of \$1,900, delivers to the defendant a conveyance and assignment as above stated—all intermediate conveyances to the plaintiff being first duly registered—or if the defendant neglects or refuses to avail himself of the provisions of this paragraph, the action will be dismissed without costs.

2. If the action is not disposed of under the provisions of paragraph 1, it will be dismissed with costs.

3. Steps hereafter taken by either party to bring about a settlement, in pursuance of paragraph 1, will, if unsuccessful, be without prejudice to the right of appeal, and, in so far as I have power so to provide, without prejudice to the status of either party upon an appeal.

The plaintiff appealed from the judgment of LENNOX, J.

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October 19. The appeal was heard by MEREDITH, C.J.O., GARROW, MACLAREN, and MAGEE, JJ.A.

G. A. Stiles, for the appellant. The plaintiff is entitled to the lands in question under the will of Isabella Margaret Gilchrist. There was no lawful marriage between the testatrix and Johnston, because at the time of the ceremony Johnston had a wife, Cora Johnston, living. There is sufficient evidence to prove the marriage between Cora Tosh and Johnston. Therefore, the will of the testatrix was never revoked. There is in all civil actions a presumption in favour of the validity of a marriage, once a ceremony has been performed: *Phipson's Law of Evidence*, 5th ed., p. 644. The evidence establishes the death of the testatrix. A coroner's inquest was held on a body supposed to be hers, on the 4th September, 1908. This fact can be used in evidence: *Regina v. Gregory* (1846), 15 L.J.N.S. M.C. 38. The probate, unless revoked, proves the death: *Allen v. Dundas* (1789), 3 T.R. 125. At any rate, at the time of the commencement of the action, it was so long since she had been heard of that she was rightly presumed to be dead. It may not have been quite seven years, but it was a sufficiently long time: *In the Goods of Matthews*, [1898] P. 17. The conveyance executed by Johnston as attorney should be set aside, because the power of attorney under which it was executed was a forgery in so far as it related to lands in Canada. In any event the power of attorney was revoked by the death of Isabella Margaret Gilchrist.

D. B. MacLennan, K.C., for the defendant, the respondent. The will of Isabella Margaret Gilchrist was revoked by her subsequent marriage to Johnston. There is no evidence of a previous marriage of Johnston to Cora Tosh. The defendant obtained a conveyance of the lands in good faith, and his possession should not be disturbed. As to the alterations in the power of attorney, there is a presumption that they were made before the execution of the instrument: *Graystock v. Barnhart* (1899), 26 A.R. 545; *Canada Permanent Loan and Savings Co. v. Page* (1879), 30 U.C.C.P. 1; *Northwood v. Keating* (1871), 18 Gr. 643. If the alterations were subsequently made, there is a presumption that they were placed there with the consent of the appointor. As to the power of attorney being revoked by the

death of Isabella Margaret Gilchrist, I submit that her death has not been proved. In order to raise the presumption of death it is necessary to prove absence for the full period of seven years, which was not done here.

Stiles, in reply. No title can be had under a forged instrument: Bowstead's Law of Agency, 4th ed., pp. 73, 278. The power of attorney must be proved strictly. There is no presumption that subsequent alterations therein were made with the consent of the appointor: Mackenzie's Powers of Attorney and Proxies, p. 168. On the question of proving the will, I rely on the Evidence Act, R.S.O. 1914, ch. 76, sec. 42.

November 27. The judgment of the Court was delivered by MEREDITH, C.J.O.:—This is an appeal by the plaintiff from the judgment dated the 6th April, 1914, which was directed to be entered by Lennox, J., after the trial of the action before him, sitting without a jury, at Cornwall, on the 18th November, 1913.

The appellant brings her action as executrix of and sole devisee under the last will and testament of Isabella Margaret Gilchrist, deceased, to whom I shall afterwards refer as "the testatrix," for the recovery of possession of the west half of lot lettered A in the 6th concession of the township of Roxborough, in the county of Stormont, except the part of the lot owned by the Canada Atlantic Railway Company, and for mesne profits and damages for the cutting of wood and timber from the land; and the respondent defends, claiming title under a conveyance alleged to have been made to him by the testatrix on the 8th December, 1906.

The conveyance to the respondent was executed by Lee H. Johnston, purporting to act under a power of attorney from the testatrix which the appellant alleges to be a forged instrument.

The testatrix at one time lived in the county of Stormont, and the respondent held the lands in question under a lease from her; she left Canada and went to Montana, one of the United States of America, where she resided for some years. In June, 1904, she went from there to Nome, in Alaska, and took up her residence there; she was in the habit of communicating by letter with the appellant, who is her sister, and the last letter which,

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according to the appellant's testimony, was received by her from her sister, was written at Nome and bore date the 19th October, 1905; a letter purporting to be written by the testatrix was received by the appellant after that date, but, according to her testimony, it was in the handwriting of Johnston, and was handed by him to her at Butte, Montana, where she resided. Except this letter, nothing has been heard from the testatrix or of her as being yet alive since October, 1905. According to the testimony of Sarah Adelia Laurence, taken under commission, she lived at Nome from 1900 to 1912, and knew the testatrix and Johnston, who were living there as man and wife. The last time she saw the testatrix was in the fall of 1905. In the latter part of the winter of 1905-06, she went to the cabin in which the testatrix had lived and found that she was not there, but Johnston was, and, upon her inquiring of him as to the whereabouts of his wife, Johnston replied: "Why, she went out last fall. Didn't you know it? I thought that was the reason you had not been around." Johnston was arrested at Seattle on the 30th July, 1908, on the charge of having murdered his wife, and, according to the testimony of Joseph F. Warren, special agent for the Second District of Alaska, also taken under commission, Johnston after his arrest told this witness that on the 30th October, 1905, he went out to get a bucket of water while his wife was preparing breakfast, and that when he returned to the house he found her lying on the floor; that he took her up and got her on the bed and that she died shortly afterwards; that there was a note under his plate stating that she wanted him to have all the property; that he had dug a hole under the cabin and rolled her up in a piece of canvass and put her down in the hole and let her remain there until the following spring, when he sold his cabin and built another "back nearly half a mile to the east of there," and that then it was necessary to remove the body, and he dug it up; that he had "difficulty in getting her up," as she weighed 250 pounds, while his own weight was only 152 pounds; that the body was frozen, and that he cut it up in pieces and put it in a vegetable crate, and put it in a hole he had dug "back of the cabin, and poured five gallons of coal-oil over it and set it on fire;" that it did not all burn and that some of it would be

found there yet; and, upon the request of the witness, he marked on a piece of paper the position, with reference to the cabin, of the place where the body was buried. According to the testimony of the same witness, Johnston on the 16th September, 1908, started for Nome on the steamer "Victoria" in charge of two guards, but never reached Nome, and that no trace of him has been since found, although every effort was made to find him. This witness also testified that he was informed, and the log of the steamer shewed, that Johnston was missed when the vessel was about nine miles from the entrance to Unimak Pass, which is a channel 15 miles wide on the Pacific Coast.

J. J. Stokes, a Deputy United States Marshal, testified to the finding of the remains of what he believed to have been a human being at the place indicated by Johnston in his statement to Warren, and an inquest was held on these remains, the result of which was attempted to be proved; but, even if evidence of it was admissible, no proper evidence was offered or received.

That Johnston and the testatrix were married in June, 1905, is well proved, and is in fact not disputed by the appellant. In December, 1906, Johnston came to the county of Stormont, having with him the title-deeds of the lands in question and what purported to be a power of attorney bearing date the 27th September, 1905, executed by the testatrix, who described herself as Isabella Gilchrist Johnston, by which she appointed Johnston her attorney "to lease, let, bargain, sell, convey, remise, release, and mortgage and hypothecate land, tenements and mining property and to do any and everything which I might or could do if personally present," and declared that the power was a general power of attorney "intended to give said Lee H. Johnston full and absolute power to act for me relating to property in the district of Alaska" "and in any part of U. States where I have interests, especially Montana, Washington and the Dominion of Canada, the latter clause supersedes and cancels all previous power of attorneys that has been issued by me, the said Lee H. Johnston being my lawful husband, and to act under personal instructions for me during his presence in U. States and Canada during my absence only."

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It is clear that this instrument as originally drawn and executed contained after the word "Alaska" the word "only," and that it did not contain the words which now follow the word "Alaska;" and it is clear also that the changes that have been made in it were made after the 16th June, 1906, on which date it was filed of record in the Cape Nome recording district. This was proved by the evidence of Fred R. Cowden, the Deputy United States Recorder of the district, who testified that he prepared the power of attorney at the instance of Johnston, that the written part of it was in his (Cowden's) handwriting, and that the part of it as it now appears after the word "Alaska" was not in it when it was executed and recorded, and that the word "only" then followed the word "Alaska;" and the copy of the power of attorney which was deposited with the Recorder demonstrates the accuracy of this witness's statement.

The power of attorney in its altered form was registered in the registry office of the county of Stormont on the 15th September, 1908, upon the authority of an order of the Junior Judge of the County Court of the United Counties of Stormont, Dundas, and Glengarry, that a copy of it should be registered in lieu of the original, which, it is stated in the order, cannot be produced. A copy of the copy deposited in the registry office, with a copy of the Judge's order and of the certificates of registration duly certified by the Registrar, was put in at the trial (exhibit 29).

The testatrix by her will, which is dated the 15th January, 1897, devised her lands in Manitoba and all her real and personal estate in Ontario to the appellant, whom she appointed her executrix.

The will was admitted to probate by the Surrogate Court of the Central Judicial District of the Province of Manitoba on the 18th November, 1911, and administration of the estate and effects, rights and credits of the testatrix, in any way concerning the will, was granted to the appellant.

The probate states that the testatrix died on the 31st October, 1905, at Cape Nome, in the district of Alaska, and that at the time of her death she had a fixed place of abode at the township

of Roxborough, in the Province of Ontario. This Manitoba probate was on the 2nd March, 1912, sealed with the seal of the Surrogate Court of the United Counties of Stormont, Dundas, and Glengarry, under the authority of sec. 74 of the Surrogate Courts Act (10 Edw. VII. ch. 31), and thereupon became of the like force and effect in Ontario as if it had been originally granted by that Court.

Many questions of law and fact were discussed upon the argument before us.

It was contended by counsel for the respondent that the will under which the appellant claims was revoked by the subsequent marriage of the testatrix with Johnston, and it was answered by counsel for the appellant that that was no marriage, because Johnston had a wife living when he went through the form of marriage with the testatrix; to this the respondent's counsel replied that there was no evidence to prove the former marriage; and that is the first question with which I shall deal.

It was proved by the testimony of Cora M. Johnston that she had gone through a ceremony of marriage with Johnston at Omaha, in the State of Nebraska, on the 28th January, 1903, and that she and Johnston, after this ceremony, lived together and believed themselves to be man and wife. She also testified that she had been informed that no marriage license was ever issued for the marriage, and that no trace could be found in Omaha of a minister bearing the name of Peterson, which was the name claimed by the man by whom the marriage ceremony was performed, and who professed to be a minister.

I am of opinion that this evidence is sufficient to prove the previous marriage of Johnston, and, if it be, the contention of the respondent that the will of the testatrix was revoked by her marriage to Johnston falls to the ground, there being no question that his first wife was living when he went through the form of marriage with the testatrix. It is well established that except in cases of bigamy and actions for criminal conversation there is a strong presumption in favour of the validity of a marriage proved to have been celebrated *de facto*: Phipson on Evidence, 5th ed., p. 644, and cases there cited, which fully sup-

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port the statement of the text-writer, and to these cases may be added *O'Connor v. Kennedy* (1887), 15 O.R. 20, *Hunt v. Trusts and Guarantee Co.* (1905), 10 O.L.R. 147, and *DeThorn v. Attorney-General* (1876), 1 App. Cas. 686, which, though the case of a Scotch marriage, is applicable upon the question of this presumption.

The cases also establish that mere cohabitation may suffice to raise a presumption of valid marriage: Phipson, p. 644, and cases there cited, to which may be added *Regina v. Wilson* (1862), 3 F. & F. 119.

It was also contended by the respondent's counsel that there was no proof as to the date of the death of the testatrix, and that all the appellant was entitled to rely on to establish the fact of her death was the presumption that, not having been heard of for seven years, she was dead, and that, as the seven years did not elapse until the expiration of seven years from October, 1905, the action, which was begun on the 14th March, 1912, must fail for want of proof that the testatrix was then dead.

As I understand the case of *Allen v. Dundas*, 3 T.R. 125, it was there held that probate of a will is conclusive until revoked, and that no Court of Law can admit evidence to impeach it, though it was pointed out that, if probate was granted of a supposed will of a living person, it was otherwise, as the Ecclesiastical Court has jurisdiction only to grant probate of the wills of deceased persons.

The onus of establishing want of jurisdiction on this ground rested upon the respondent; and, in order to shew want of jurisdiction, it was necessary to prove that the testatrix was living at the date of the grant of the probate; and in this he has failed.

There is no presumption of law as to the continuance of life, though an inference of fact may legitimately be drawn that a person alive and in health at a certain time was alive a short time after, and it has been held that this inference might be drawn after the lapse of eleven or even seventeen years from the time at which it was shewn that the person was alive. Being an inference of fact, whether it ought to be drawn must depend upon

the particular facts of the case in which the question arises; and the facts of this case, in my opinion, do not warrant the inference that the testatrix was alive at any time later than the beginning of 1906, but rather justify the inference being drawn that she was then dead. That the presumption of death, not as a matter of law but as a matter of fact, may arise, is undoubted, and it has frequently been held to have arisen, although the seven years had not elapsed, and of this the cases of *In the Goods of Matthews*, [1898] P. 17, and *In the Goods of Winstone*, *ib.* 143, are instances.

I am not unmindful of the fact that the proposition in *Allen v. Dundas* as to the powers of a Court of Law is not in its entirety applicable to this Province, because by the Judicature Act the Supreme Court of Ontario has jurisdiction to try the validity of last wills and testaments as to real and personal estate, whether probate of the will has been granted or not, and to pronounce such wills and testaments to be void for fraud or undue influence or otherwise, in the same manner and to the same extent as the Court has jurisdiction to try the validity of deeds and other instruments.*

For these reasons, I am of opinion that the appellant proved her title to the lands in question, unless, as the respondent contends, he is entitled to them by virtue of the conveyance under which he claims.

As I have said, the conveyance was executed by the testatrix, by Johnston purporting to act as her attorney under the power of attorney to which reference has been made. It is clearly established, as I have also said, that the power of attorney as drawn and executed by the testatrix did not contain any provision authorising Johnston to deal with lands in Canada, but expressly limited his authority to lands in the district of Alaska, and that the provision extending his authority to lands in Canada was subsequently added.

It was contended by counsel for the respondent that it must be presumed that the alterations which were made in the power of attorney were made before it was executed, and that it is

*See the Judicature Act, R.S.O. 1897, ch. 51, sec. 38, and the Judicature Act, R.S.O. 1914, ch. 56, sec. 3.

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also to be presumed that, if subsequently made, they were made with the assent of the appointor. I do not understand that the presumption has as wide a range as this. It is, no doubt, to be presumed that alterations appearing in a deed were made before it was executed, but it is not, in my opinion, the law that where that presumption has been rebutted by proof to the contrary there is still a presumption that the alterations were made with the assent of the grantor, and no authority was cited in support of the contention of the learned counsel in that regard.

Sections 45 and 46 of the Evidence Act, R.S.O. 1914, ch. 76, do not help the respondent, as the *primâ facie* evidence of the original which is afforded by the production of a copy of the instrument certified as sec. 46 provides, if indeed the section has any application to a case in which not the original but a copy of it has been registered, is rebutted by the evidence which, as I have said, rebuts the presumption with which I have just dealt.

The appellant is, in my opinion, entitled to judgment for the recovery of possession of the land in question, but I would not allow anything for mesne profits or for damages for the cutting of wood and timber, as these claims may be fairly set off against the value of the improvements which the respondent has made.

The appeal will, therefore, be allowed, and the judgment of the trial Judge vacated, and judgment entered for the appellant for the recovery of possession of the lands in question, with a declaration that as against the respondent she is the owner of them.

Under the very exceptional circumstances of the case, and there being no doubt that the respondent bought the lands and paid for them in good faith, believing that Johnston had authority to sell and convey them to him, there should be no costs to either party of the action or of the appeal.

Appeal allowed.

[APPELLATE DIVISION.]

RE ONTARIO AND MINNESOTA POWER CO. AND TOWN OF FORT
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Ontario Railway and Municipal Board—Jurisdiction—Appeal to Board Directly from Decision of Court of Revision Confirming Assessment—Right of Appeal—Interpretation of Statutes—Leave to Appeal to Supreme Court of Ontario, Appellate Division—Refusal of.

An application by the company for leave to appeal from an order or decision of the Ontario Railway and Municipal Board, of the 16th June, 1914, dismissing, upon the ground of want of jurisdiction, an appeal directly to the Board by the company from the decision of the Court of Revision of a town in a territorial district, confirming the company's assessment in respect of property in the town for 1913, the appeal having been launched before the 1st July, 1913, was refused; it being *held*, that the appeal to the Board was not competent, and that the Board rightly determined that it had no jurisdiction to hear it.

Re Fort Frances Assessment (1913), 27 O.L.R. 622, referred to.

Consideration of the following enactments of the Ontario Legislature: the Assessment Act, R.S.O. 1897, ch. 224, secs. 75, 84; the Act respecting the Establishment of Municipal Institutions in Territorial Districts, R.S.O. 1897, ch. 225, secs. 40-59; the Assessment Act, 4 Edw. VII. ch. 23, sec. 76; 4 Edw. VII. ch. 24, sec. 5; 5 Edw. VII. ch. 24, secs. 1, 2, 3; the Ontario Railway and Municipal Board Act, 6 Edw. VII. ch. 31, secs. 43, 52; 10 Edw. VII. ch. 88, sec. 18; the Assessment Amendment Act, 1913, 3 & 4 Geo. V. ch. 46, sec. 13; the Municipal Act, 1913, 3 & 4 Geo. V. ch. 43; the Ontario Railway and Municipal Board Act, 1913, 3 & 4 Geo. V. ch. 37.

MOTION by the company for leave to appeal from an order or decision of the Ontario Railway and Municipal Board, of the 16th June, 1914, dismissing, upon the ground of want of jurisdiction, an appeal to the Board by the company from the decision of the Court of Revision of the Town of Fort Frances affirming the company's assessment for the year 1913.

October 9. The motion was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A.

Glyn Osler, for the company, the applicant, relied upon the amendment to the Assessment Act made by 3 & 4 Geo. V. ch. 46, sec. 13, and by the repeal of R.S.O. 1897, ch. 225, by 3 & 4 Geo. V. ch. 43. He also referred to Craies' Statute Law, 4th ed., p. 354; *Colonial Sugar Refining Co. Limited v. Irving*, [1905] A.C. 369; and to many of the statutory provisions referred to in the judgment.

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E. E. A. Du Vernet, K.C., for the town corporation, the respondent, relied upon the decision of the Court of Appeal in *Re Fort Frances Assessment* (1913), 27 O.L.R. 622; and discussed the meaning and effect of the statutes.

November 27. The judgment of the Court was delivered by MEREDITH, C.J.O.:—This is a motion by the Ontario and Minnesota Power Company for leave to appeal from an order or decision of the Ontario Railway and Municipal Board, dated the 16th June, 1914, dismissing an appeal to the Board by the applicant from the Court of Revision of the Town of Fort Frances, upon the ground that the Board had no jurisdiction to hear the appeal.

The applicant appealed to the Court of Revision against its assessment for the year 1913, and its appeal was dismissed on the 20th June, 1913.

The applicant gave notice of its intention to appeal to the Ontario Railway and Municipal Board from its assessment as confirmed by the Court of Revision; the notice of appeal was addressed to the Board, and was received by it on the 4th July, 1913; a copy of the notice was served upon or filed with the clerk of the municipality between the 23rd and the 28th June, 1913, but upon what day is not shewn. The appeal came on to be heard before the Board on some day prior to the 16th June, 1914, but on what day does not appear; and the further consideration of it took place on the 16th June, 1914, when the decision from which the applicant desires to have leave to appeal was given.

The view of the Board was that the result of subsequent legislation was to take away the right which previously existed of a person assessed to appeal directly from the Court of Revision to the Board, and that the only appeal which it had jurisdiction to hear and determine was an appeal from the decision of the Judge of the District Court on an appeal to him from the decision of the Court of Revision.

The Assessment Act, R.S.O. 1897, ch. 224, deals with assessments generally, and ch. 225, which is intituled "An Act respecting the Establishment of Municipal Institutions in Terri-

torial Districts," contains provisions relating to assessments and taxes. These provisions are contained in secs. 40 to 59 both inclusive, and they deal with the appointment of assessors and their duties; the preparation of the assessment rolls; the return of them to the clerk of the municipality; the adoption by the council of the year following the return of the assessment roll of the assessment of the preceding year as the assessment for that year; the alteration and fixing by the council of the time for making the assessment, subject to the provision that the new assessment is to be made within a period of not more than 3 years from the date upon which the last assessment roll was finally revised; the right to appeal to the council from his assessment by any person assessed, upon giving notice of his appeal within a prescribed time; for the hearing of the appeals by the council; and the time within which the roll is to be finally passed by the council.

Section 45 gives an appeal from the decision of the council in respect of any first or subsequent assessment in the same manner as to the County Judge in other municipalities, and provides that, subject to sec. 84 of the Assessment Act, the appeal in municipalities in certain districts shall be to the District Judge, and in municipalities in certain other districts, of which Rainy River is one, to the Stipendiary Magistrate of the district.

Sections 46 and 47 deal with the procedure in case of an appeal under sec. 45.

Section 48 provides that the Judge or Stipendiary Magistrate shall have the like powers and perform the like duties in respect of the appeals as are performed by the County Judge in like case in other municipalities.

Section 49 provides that the roll, when finally revised by the council, or by the Judge or Stipendiary Magistrate in case of appeal, shall be taken and held to be the roll of the municipality, for all purposes, until a new roll has been made as provided by the Act.

The Act also provides for the passing of by-laws for levying the rate; as to how taxes are to be expended in certain localities;

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that the council is to fix the time "for the collector to make his return;" and gives to the collector all the powers conferred upon collectors by the Assessment Act.

Section 53 provides for the collection and management of arrears of taxes, and deals with the sale of land for arrears of taxes.

The other sections have no bearing upon the question under consideration.

The Assessment Act, ch. 224, does not, with a few exceptions, in terms exclude municipalities in territorial districts from the operation of its provisions; but, doubtless, such of them as relate to matters of assessment and taxation specially dealt with by ch. 225, and dealt with differently from the way in which the like matters are dealt with by the Assessment Act, are impliedly excluded, and where they are not so excluded the provisions of the Assessment Act are, I think, applicable to municipalities in territorial districts.

Instances of the express exclusion of certain provisions are found in sub-secs. 2 and 7 of sec. 75.

Section 84 deals with appeals where large amounts or questions of law are involved, and its first sub-section gives the appeal to a Board of County Judges in cases of assessments of \$20,000, where there is an appeal from the Court of Revision under sec. 75 to the County Judge.

Sub-section 2 gives the appeal, in certain cases of assessments for \$20,000, to a Judge of the County Court of the county to which the district or provisional county is attached for judicial purposes, where an appeal against the assessment lies from the Court of Revision to the Stipendiary Magistrate of the district or provisional county.

Sub-section 3 applies secs. 75 to 86 inclusive to these appeals.

Sub-section 4 provides that where there are three Judges the opinion of the majority is to prevail, subject to appeal to the Court of Appeal.

Sub-section 5 provides for payment of the travelling expenses of the Judges; and sub-sec. 6 provides that "an appeal shall lie to the Court of Appeal from any judgment or decision of the

said Judges or a majority of them;" and for the procedure on the appeal and the number of Judges required to hear the appeal; and it also provides that the decision of these Judges or a majority of them shall be final.

The Assessment Act was repealed by 4 Edw. VII. ch. 23, in which the provisions of sec. 84 were re-enacted as sec. 76, and the Act repealed secs. 56, 57, and 59 of ch. 225.

By sec. 5 of 4 Edw. VII. ch. 24, sec. 40 of ch. 225 was repealed, and a new section was substituted for it, providing for the appointment of assessors and the making of the assessment roll and for notice of assessments being given to persons assessed.

Section 43 was amended by giving the right of appeal to "any person assessed who thinks that he or any other person has been assessed too high or too low or who complains of any error or omission in regard to the assessment of himself or any person."

Section 45 was amended by substituting for "84" the figures "76" so as to make it agree with the sections as numbered in the Assessment Act of 1904, and some amendments were made to secs. 50 and 52.

By sec. 1 of 5 Edw. VII. ch. 24, sec. 45 of ch. 225 was repealed and the following substituted for it: "45. Notwithstanding anything in the Assessment Act or in any special Act contained, an appeal shall lie from the decision of the council or of any Court of Revision upon any complaint in respect of the first or any subsequent assessment to the District Judge in the same manner as to the County Judge in other municipalities, and such appeal shall lie whether the municipality was organised under any general Act relating to municipal institutions or to municipalities of any class, or was incorporated by special Act or otherwise."

By sec. 2, secs. 46, 48, and 49 were amended by striking out the words "Stipendiary Magistrate" or "Magistrate" wherever they occur.

The effect of these amendments was that thereafter, subject to sec. 48 (a), appeals in all the districts were to the District Judge.

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By sec. 3 there was added to ch. 225 a new section, 48 (a), which provides as follows:—

“(1) Where there is an appeal from any municipal council or Court of Revision under section 45 of this Act, to the District Judge, and a person desiring to appeal has been assessed upon one or more properties to an amount aggregating \$10,000, such person may, if he so desires, appeal to a Judge of the High Court in Chambers at Toronto instead of to the said District Judge, and such appeal to the said Judge in Chambers shall be upon the like notice and otherwise as in the case of an appeal to the District Judge under this Act, and the said Judge of the High Court in Chambers shall have the like powers and shall perform the like duties in respect of such appeal as are performed by the County Judge in like cases in other municipalities.

“(2) An appeal shall lie to the Court of Appeal from any judgment or decision of the said Judge of the High Court in Chambers, and subject to any rule of Court relating to such appeals, the procedure shall be as far as may be the same as upon an appeal from the County Court to the High Court. The appeal shall be heard by three or more Judges of the Court of Appeal, and the decision of such Judges or a majority of them shall be final and conclusive.

“(3) Upon an appeal upon any ground against an assessment the District Judge or the Judge of the High Court in Chambers or the Court of Appeal, as the case may be, may reopen the whole question of the assessment so that omissions from or errors in the assessment roll may be corrected, and the accurate amount for which the assessment should be made, and the person or persons who should be assessed therefor may be placed upon the roll by the Judge of the Court, and, if necessary, the roll of any particular ward or subdivision of the municipality even if returned as finally revised may be opened so as to make the same correct in accordance with the finding of such Judge or Court.”

By sec. 52 of the Ontario Railway and Municipal Board Act, 1906 (6 Edw. VII. ch. 31) it was provided as follows:—

“52—(1) Instead of the appeal provided for by sub-section

1 of section 48 (a) of the Act respecting the Establishment of Municipal Institutions in Territorial Districts being to a Judge of the High Court in Chambers at Toronto, it shall be to the Board.

“(2) One member may act as and for the Board in the hearing and determining of the appeal mentioned in this section.”

The Act 10 Edw. VII. ch. 88, sec. 18, repealed sec. 76 of the Assessment Act of 1904, and substituted for it a new section, which deals only with cases in which there is an appeal from the Court of Revision under sec. 68 to the Judge of the County Court of the county in which the assessment is made; and the provisions of the section do not, therefore, affect the question under consideration.

The result of this legislation was, that a person assessed in a municipality in a territorial district had the right to appeal in respect of his own or any other person's assessment to the council of the municipality, and the right of a further appeal to the District Judge, whose decision was final; but that, if the person desiring to appeal from the council or the Court of Revision was assessed upon one or more properties to an amount aggregating \$10,000, he had the right, instead of appealing to the District Judge, to appeal to the Ontario Railway and Municipal Board; but, notwithstanding this right of appeal to the Board, a ratepayer had the right, according to the decision of the Court of Appeal in *Re Fort Frances Assessment*, 27 O.L.R. 622, to appeal to the District Judge as provided by sec. 43 of ch. 225, as amended by 4 Edw. VII. ch. 24, sec. 5 (2), and there was a further appeal to the Court of Appeal from the decision of the Board upon a question of jurisdiction or law, if leave to appeal should be given by the Court (6 Edw. VII. ch. 31, sec. 43).

I apprehend that the effect of the amendments to ch. 225 was impliedly to repeal sec. 76 of the Assessment Act of 1904; but whether it did or not is immaterial, as the only part of the section which was applicable to territorial districts was sub-sec. 2, which provided for an appeal to the Judge of the County Court

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of the county to which the district was attached for judicial purposes, and the district in which the applicant's land lies is not so attached to any county.

It was, I have no doubt, intended by sec. 13 of the Assessment Amendment Act of 1913 (3 & 4 Geo. V. ch. 46), and by the repeal by the Municipal Act of 1913 (3 & 4 Geo. V. ch. 43) of ch. 225, and the repeal of the Ontario Railway and Municipal Board Act of 1906, and the re-enactment of it, omitting sec. 52, by 3 & 4 Geo. V. ch. 37, to get rid of the anomaly which resulted from the decision in the *Fort Frances* case, and to provide that there should be no right of appeal directly from the Court of Revision to the Ontario Railway and Municipal Board; but, unfortunately perhaps, while the Assessment Amendment Act of 1913 and the new Ontario Railway and Municipal Board Act came into force on the 6th May, 1913, the new Municipal Act did not become law until the 1st July, 1913.

The result of this, it is argued, is that the right of the assessed property-owner to appeal directly from the Court of Revision to the Ontario Railway and Municipal Board was not taken away until the repeal of ch. 225 took effect on the 1st July, 1913.

Section 13 of the Assessment Amendment Act of 1913 (3 & 4 Geo. V. ch. 46) repeals sec. 76 of the Assessment Act, as enacted by sec. 18 of ch. 88 of 10 Edw. VII., and substitutes for it a new section, which provides that the appeals for which the section makes provision, both in municipalities in territory without county organisation and in other municipalities, shall lie from the decision of the Judge to the Ontario Railway and Municipal Board, and until ch. 225 was repealed the effect of this was merely to provide that an appeal should lie from the decision of the Judge to the Board—in other words, that where the person assessed appealed to the District Judge he should have a further appeal to the Board.

It is unnecessary, in the view I take, to decide whether the section has the effect of impliedly repealing the provisions of ch. 225 as to appeals and the amendments to that Act to which I have referred; for, assuming that they are not repealed, there remains in the way of the applicant the fact that sec. 52 of the

Ontario Railway and Municipal Board Act of 1906, which provided for the appeal to the Board, was repealed before the decision of the Court of Revision was given, and that this resulted either in taking away altogether the right to appeal directly from the Court of Revision or in leaving the right as it existed before that Act was passed, that is, to appeal to a Judge of the High Court in Chambers.

It follows from this that the appeal to the Board was not competent, and that the Board rightly determined that it had no jurisdiction to hear it; and the result is, that the application must be dismissed, and I would dismiss it with costs.

Appeal dismissed with costs.

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ONTARIO ASPHALT BLOCK CO. v. MONTREUIL.

Vendor and Purchaser—Agreement for Sale of Land—Specific Performance—Water Lot—Conveyance—Title—Trust for Remaindermen—Costs.

Two questions were left open when the judgment in 29 O.L.R. 534 was given; and as to these it was now *held*, that, as between the parties to the action, it had not been established that the defendant was a trustee of the remainder in fee in the water lot in question for his children, and that specific performance in respect of the water lot should be adjudged; (2) that the trial Judge's disposition of the costs of the action should not be disturbed, but that there should be no costs of the appeal to either party.

APPEAL by the defendant from the judgment of LENNOX, J., at the trial.

The judgment of LENNOX, J., and that of the First Divisional Court of the Appellate Division are reported in 29 O.L.R. 534.

November 27. The two questions which were there left open were disposed of by the judgment of the Court (which was composed of MEREDITH, C.J.O., MACLAREN and MAGEE, JJ.A., and LEITCH, J.), delivered by MEREDITH, C.J.O.:—This case was heard before us on the 7th November, 1913, and we gave judgment, on the main points, on the 17th November, 1913 (29 O.L.R.

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534), but we left open two questions: the one as to costs, and the other as to whether the appellant should be ordered to convey to the respondent the water lot which he contended was held by him as trustee for his children, although it stands in his own name.

The Court suggested to the parties that "the proper course to be taken in the circumstances is, either to direct an inquiry into the title of the water lot, or to retain the action for six months in order to enable the remaindermen, if so advised, to take steps to establish their right."

The parties do not desire to do anything, apparently wishing that judgment be given, when they will shape their course as they may be advised.

We think that the judgment must order the conveyance of the water lot. It is true that the appellant sets up that he is a trustee for his children. Of course, if the action were between him and his children, that would be conclusive, but in this action it has not that effect.

I should have mentioned that the number of the lot is 97, and the water lot is in front of it, on the Detroit river.

The appellant, believing himself to be the owner of the land, under the will of his father, made a lease to the respondent, for a term of years, giving the respondent an option to buy at the expiration of the term. The respondent exercised the option; and, in litigation which subsequently took place, it was determined that the appellant was not owner in fee of the land, but that under the will he was only tenant for life, and on his death the property went to the children.

Judgment has gone for specific performance, with compensation in respect of the interest which the appellant is not in a position to convey.

With regard to the water lot, the facts appear to be that the practice of the Crown Lands Department is to sell the water lot to the owner of the adjoining land; that the appellant, believing himself to be, under his father's will, the owner in fee of lot 97, applied for a patent of the water lot in front of it; that he laid before the Department of Crown Lands an abstract of title,

and subsequently furnished to the Department an extract from the will, containing the devise under which it was assumed that he took, and that the Crown, evidently under the same impression that the appellant was under, that he was the owner in fee of the land, granted the water lot to him.

We think that, under these circumstances, especially as nothing has been done by the children to assert any title to the water lot, and advantage has not been taken of the delay (now nearly a year) since our former judgment was given, to do so, we must hold that the Crown intended to grant the water lot to the appellant, and that he is, therefore, not a trustee for the remaindermen of the remainder in fee after his life estate for his children. Of course, this decision will in no way bind the children in the event of their seeking hereafter to establish their right to it, but between the parties we determine that it has not been established that the appellant is a trustee of the remainder in fee for his children; and, therefore, specific performance in respect of the water lot will be adjudged.

As to costs, we will not disturb the disposition made by the learned trial Judge of the costs of the action, but there should be no costs of the appeal to either party.

[LENNOX, J.]

MACKELL V. OTTAWA SEPARATE SCHOOL TRUSTEES.

Constitutional Law—Schools Laws of Ontario—Roman Catholic Separate Schools—English-French Schools—Regulations of Department of Education—Intra Vires—"Denominational Schools"—French-Canadian Supporters—"Class of Persons"—Right or Privilege Existing at Time of Union not Prejudicially Affected—Violation of Regulations—Unauthorised Use of French Language — Employment of Unqualified Teachers—Preventing Inspection — Delegation of Powers of Board—Ultra Vires—Declaration—Injunction—Mandamus—Costs—Damages.

By sec. 93 of the British North America Act, 1867, in and for each Province the Legislature may exclusively make laws in relation to education; but, sub-sec. 1, nothing in any such law shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons have by law in the Province at the Union:—

Held, that this is a distinct and positive limitation upon legislative action; and, subject to this limitation only—and in default of the exercise of federal jurisdiction under sub-secs. 3 and 4—the unfettered direction and control of education within the Province is committed to the Provincial Legislature.

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2. That Roman Catholic separate schools in Ontario are "denominational schools" and the French-Canadian supporters of the separate and public schools of Ontario are a "class of persons," within the meaning of subsec. 1.
 3. That the defendants, the Board of Trustees of the Roman Catholic Separate Schools for the City of Ottawa, had failed to shew that the Instructions issued in June, 1912, and August, 1913, by the Ontario Department of Education in regard to English-French Public and Separate Schools, or the manner in which those Instructions had been or were being administered by the Department, "prejudicially affected any right or privilege with respect to denominational schools" which the defendants or the French-Canadian supporters of the separate schools had "by law in the Province at the Union;" and it did not appear that these Instructions or the manner of their administration or the statutes upon which they were founded were *ultra vires* of the Provincial Legislature.
 4. That the defendants, upon the evidence, had disregarded and disobeyed the regulations of the Department, by the unauthorised use of the French language in their schools, by the employment of unqualified teachers, by preventing the inspection of the schools by the authorised inspectors, and in other ways.
 5. That the resolutions of the defendants (the Board) purporting to delegate to the Chairman of the Board power to discharge, select, and engage teachers, were *ultra vires*.
- The plaintiffs, who were ratepayers of the city and supporters of separate schools for Roman Catholics, some of them being members of the Board, who had objected to the resolutions and other acts of the Board contrary to the Regulations of the Department, but were in a minority, were given relief by way of declaration, injunction, and mandamus, with costs against the Board; but the Court refused to penalise the majority members of the Board by making them personally liable for costs and damages.

ACTION by R. Mackell and others, ratepayers of the city of Ottawa and supporters of separate schools for Roman Catholics in the city, some of them being members of the Board of Trustees, against the Board of Trustees of the Roman Catholic Separate Schools for the City of Ottawa, for an injunction restraining the defendants (a) from continuing in their employ or paying out of the moneys of the Board the salaries of all teachers in the employ of the defendants not possessing the proper legal qualifications to teach or not authorised to teach according to the provisions of any Act of the Legislature of Ontario or the Regulations of the Department of Education, or who refuse or neglect to conform to or who contravene the regulations; (b) from passing or enacting any by-law or by-laws authorising the borrowing of money by debentures, mortgage, or otherwise, whilst the defendants neglect or refuse to conform to and enforce the Regulations; and for a mandatory order requiring the defendants to conform to and enforce in the schools under their jurisdiction the said Regulations; and for an order for the pay-

ment of damages and costs by the individual members of the Board by whose authority the Regulations are disregarded or contravened.

The action was begun on the 29th April, 1914; and on that day an interim injunction was granted by FALCONBRIDGE, C.J. K.B., in the terms of claims (a) and (b) as above; and this was continued until the trial by HODGINS, J.A., on the 20th May, 1914.

June 25. The trial was begun before LENNOX, J., without a jury, at Ottawa; and the further trial was then adjourned, the injunction being continued.

Pending the adjournment, an application was made by the plaintiffs to continue and extend the injunction and for a mandatory order to meet the situation described below.

September 5. This application was heard by LENNOX, J., in the Weekly Court at Toronto.

J. F. Orde, K.C., *W. N. Tilley*, and *J. J. O'Meara*, for the plaintiffs.

McGregor Young, K.C., for the Department of Education.

N. A. Belcourt, K.C., and *A. C. McMaster*, for the defendants.

September 11. LENNOX, J.:—The plaintiffs are a minority of the School Board. It will be sufficiently accurate to say that this action is brought to compel the Board, represented for the most part by Chairman Genest, to conduct the schools according to the Departmental Regulations, to engage and employ a teaching staff composed exclusively of legally qualified persons, to prevent the payment of school moneys to unqualified teachers, and to prevent the sale or disposal of certain debentures.

The Court has recognised the plaintiffs' status, the importance of the issues raised, and the plaintiffs' *primâ facie* right to relief, by enjoining the defendants until the trial. The bulk of the evidence on both sides was put in on the 25th June last, when an adjournment was asked for and obtained by the defend-

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ants to enable them to make further searches in the records of the Department, and, though strenuously opposed, the injunction was continued.

The adjournment was decidedly an indulgence to the defendants, as, so far as I am aware, no intimation of the application was given until the evidence for the defence was well advanced. The object of the action, the terms and aim of the injunction, and the conditions necessarily implied upon an adjournment, should, without more, have been a sufficient guarantee that the efficiency of the schools would be preserved, and the *status quo* honourably maintained pending the delay; but, had I known then that Mr. Genest contemplated what he has since consummated, namely, the turning out of the whole teaching staff, there would have been no adjournment without such additional guarantees as would have rendered the present disgraceful and disastrous conditions impossible.

Every separate school in Ottawa is closed, 7,000 or 8,000 boys and girls are without the means of obtaining an education, and the vicious and perhaps criminal habits which some of them will inevitably acquire in a life of idleness will probably never be shaken off. The teachers were discharged, if they were discharged at all, by Mr. Genest. This was done pursuant to a resolution of the Board, opposed by the plaintiffs, purporting to delegate to him the entire question of the discharge and engagement of teachers. Mr. Genest is a keen, intelligent gentleman, of excellent address, and in giving evidence argued the case from his standpoint with singular ability, but I failed to glean from his statements that he has actually a single teacher immediately available of the qualified class, and he frankly disclosed that one chief object of his action was to create a condition of things which would compel the Department to consent to the employment of some 23 Christian Brothers, who are without professional qualification.

I am asked to continue the injunction, and the injunction will be continued until I have given judgment in the action, and it will be continued with the addition that, if the plaintiffs desire it, it will be so amended as in words to apply to the servants,

agents, employees, and representatives of the defendants, as well as to the defendants; and, on the other hand, I reserve the right to the defendants to apply for leave meantime to dispose of some of the debentures should an actual emergency arise.

I am asked, too, to make an interim order directing that the schools shall be opened forthwith, and that the former teachers shall be restored to the positions they occupied in the schools prior to and at the end of the last half-year. It is argued for the defendants that for me to do this would be to usurp the functions and duties of the trustees. That, of course, I cannot do, however deplorable the conditions are now or however intolerable they are likely to become during the many months—probably years—that must elapse before the issues in this action are finally determined. There is no use in saying that it is easy; it is a difficult question to deal with. It was argued at great length that the remedy does not arise in the action and that the rules of procedure bar the way. Rules of procedure are for the convenience of litigants and the Court, and the advancement of justice, and should not be invoked to perpetuate a wrong. If the relief asked is incidental to the action, I can grant it if it would be granted upon substantive motion. But the more important point is to draw the line correctly between the jurisdiction of the Court and the exclusive functions of the trustees. If amendments of the pleadings are necessary to meet the evidence and define the issues as they have developed, and there is no answer of surprise, the pleadings can be, and in this instance they may be, amended.

As to the dividing line then? In matters relating to the schools under their control, the defendants are clothed with wide discretionary and quasi-judicial powers. Assembled at a properly constituted meeting of the Board, regularly conducted, dealing with matters within their jurisdiction, and acting in the *bonâ fide* discharge of their duties, and in harmony with the laws of the Province, the Regulations of the Department, and any existing judgment or order of the Court affecting them, the conclusions they reach, whether thought to be wise or unwise, cannot be interfered with by a Court. They are the judges in

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such a case. The salaries they will pay—the engagement and discharge of teachers, or the selection or rejection of duly qualified teachers, from time to time as these questions arise, but not in advance—are all matters within their jurisdiction.

But to shut out judicial action where error or misdoing exists and a remedy is invoked, there must be the act of the Board *as a Board*, and not merely the act of its individual members. In all matters involving discretion or judgment the whole question *must be* presented to the Board, *should be* weighed and considered by the Board, and *must be* determined upon by the Board.

What was done here was the act of Chairman Genest alone. The Board had not the power to delegate their duties or functions to him.

They have not discharged the old teachers, and they have not entertained or deliberated or determined upon the selection or engagement of any teacher or teachers to take their places; and, speaking of the majority, for the plaintiffs are powerless, the Board, by their flagrant neglect to discharge the duties imposed upon them by law, have not only opened the way, but have, unintentionally, invoked the action of the Court. More than this, not only was there no power to delegate, but the resolution purporting to appoint Mr. Genest was vicious and unlawful *per se*, for its exercise was intended, upon the face of it, to contravene and override the injunction order of the Court should it be issued. The omission of this provision from a subsequent resolution does not change the character of the act.

There is a palpable absence of good faith in the whole transaction; it is contrary to the spirit and intent of the injunction order; it is contrary to what was necessarily implied upon the adjournment; and it has created an intolerable state of things which I feel I have power to and ought to remedy.

There will be an order directing the trustees to open the schools not later than Wednesday next, and to maintain and keep them open and properly equipped with properly qualified teachers and in all other ways until argument and judgment in this action; to suffer, permit, and facilitate the return of the

ousted teachers referred to, to their former positions as teachers—and restraining the Board from interfering with or molesting these teachers in the discharge of their duties as such during the time aforesaid. The order will include the servants, agents, and employees of the defendants, and may contain provisions for notices being sent out by the secretary to the teachers concerned. If the parties cannot agree as to the terms of the order to be issued, I will settle them in the jury-room of the court-house (city-hall), in the city of Toronto, on Monday next, the 14th instant, at 10 a.m.; and I will then consider any argument addressed to me as to teachers said to have been engaged before the 5th of this month. I shall also be prepared to hear argument as to whether the Board should be restrained from giving notice terminating the engagements pending the judgment, except upon leave of the Court.

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The order, as finally settled and issued, was in terms briefly summarised as follows:—

1. That the defendants should open their schools not later than Wednesday the 16th September, 1914, with duly qualified teachers, and keep the schools open and properly equipped and conduct them according to law until the final determination of the action.
2. That the defendants should suffer, permit, and facilitate the return of the duly qualified teachers who had been discharged, and that the defendants should be restrained from molesting these teachers in the discharge of their duties until the final determination of the action.
3. That the defendants should be restrained until final judgment from giving any notice to any of the teachers terminating their employment, except by leave of the Court.
4. That the defendants' secretary should give the notices necessary for the carrying out of the order.
5. That leave should be reserved to the defendants to apply to vary this order and the previous injunction orders so as to permit of the raising of moneys should actual emergency arise.
7. Save as aforesaid, that the injunction order of the 29th

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April, 1914, should be continued until final judgment and amended so as to bind not only the defendants, the School Board, but the members of the Board, and the servants, agents, and representatives of the Board.

8. That the plaintiffs and defendants should have leave to amend the pleadings as they might be advised.

The trial of the action was afterwards completed, and judgment was reserved.

November 28. LENNOX, J.:—There are only two classes of primary schools in Ontario—public and separate schools. “Public school,” or “separate school,” simply, imports an English school. For convenience, the Department of Education annually designates certain schools attended by French-speaking pupils as English-French, and these may be either public or separate schools. The defendants have under their charge 192 Roman Catholic separate schools, of which 116 are English-French.

The main issue to be determined in this action is the validity or invalidity of certain provisions of the School Laws of Ontario, and particularly of Instructions or Regulations numbered 17 of the Department of Education, issued in June, 1912, and August, 1913.* I will deal with this issue first.

*The following is the “Circular of Instructions” in relation to English-French Public and Separate Schools issued by the Department of Education for Ontario in August, 1913. The “Circular of Instructions” issued in June, 1912, was for the school-year 1912-13, and was in similar, though not identical, terms.

“CIRCULAR OF INSTRUCTIONS.”

1. There are only two classes of primary schools in Ontario—public schools and separate schools; but, for convenience of reference, the term English-French is applied to those schools of each class annually designated by the Minister for inspection as provided in 5 below and in which French is a language of instruction and communication as limited in 3 (1) below.

2. The Regulations and courses of study prescribed for the Public Schools, which are not inconsistent with the provisions of this circular, shall hereafter be in force in the English-French schools—public and separate—with the following modifications: the provisions for religious instruction and exercises in public schools shall not apply to separate schools, and Separate School Boards may substitute the Canadian Catholic readers for the Ontario Public School readers.

3. Subject, in the case of each school, to the direction and approval of

Under our constitution, the power to make educational laws and the control of education are for the most part committed to the Provinces. It is not an unfettered power or unlimited control. There is power vested in the Governor-General in Council and the Dominion Parliament by which they may, if they will,

the chief inspector, the following modifications shall also be made in the course of study of the public and separate schools:—

(1) Where necessary in the case of French-speaking pupils, French may be used as the language of instruction and communication; but such use of French shall not be continued beyond Form I., excepting that, on the approval of the chief inspector, it may also be used as the language of instruction and communication in the case of pupils beyond Form I. who are unable to speak and understand the English language.

(2) In the case of French-speaking pupils who are unable to speak and understand the English language well enough for the purposes of instruction and communication, the following provision is hereby made:—

(a) As soon as the pupil enters the school he shall begin the study and the use of the English language.

NOTE.—A manual of method for use in teaching English to French-speaking pupils has been distributed amongst the schools by the Department of Education. This manual should be used in all schools. Where necessary, copies may be procured on application to the Deputy-Minister.

(b) As soon as the pupil has acquired sufficient facility in the use of the English language, he shall take up in that language the course of study as prescribed for the Public and Separate Schools.

4. In schools where French has hitherto been a subject of study, the Public or the Separate School Board, as the case may be, may provide, under the following conditions, for instruction in French reading, grammar, and composition in Forms I. to IV. [see also provision for Form V. in Public School Regulation 14 (5)] in addition to the subjects prescribed for the public and separate schools:

(1) Such instruction in French may be taken only by pupils whose parents or guardians direct that they shall do so, and may, notwithstanding 3 (1) above, be given in the French language.

(2) Such instruction in French shall not interfere with the adequacy of the instruction in English, and the provision for such instruction in French in the time-table of the school shall be subject to the approval and direction of the chief inspector, and shall not in any day exceed one hour in each class-room, except where the time is increased upon the order of the chief inspector.

(3) Where, as permitted above, French is a subject of study in a public or a separate school, the text-books in use during the school year of 1911-1912, in French reading, grammar, and composition, remain authorised for use during the school-year of 1913-1914.

5. For the purpose of inspection, the English-French schools shall be organised into divisions, each division being under the charge of two inspectors.

6. (1) In conducting the work of inspection, the inspectors of a division shall alternately visit each school therein, unless otherwise directed by the chief inspector.

(2) Each inspector shall pay at least 220 half-day visits during the year, in accordance with the provisions of Public School Regulation 20 (2), and it shall be the duty of each inspector to pay as many more visits than the minimum as the circumstances may demand.

7. Each two inspectors of a division shall reside at such centre or centres as may be designated by the Minister.

8. Frequently during the year the two inspectors of a division shall meet together in order to discuss questions that may arise in their work

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prevent the effective exercise of the jurisdiction conferred upon the Provincial Legislatures: sub-secs. 3 and 4 of sec. 93† of the British North America Act, 1867. But, notwithstanding the

and to standardise the system of inspection. For the same purposes all the inspectors shall meet at such times and places as may be designated by the Minister.

9. Each inspector shall report upon the general condition of all the classes, on the form prescribed by the Minister. This report shall be subject to the approval of the Minister upon the report of the chief inspector.

10. If either of the inspectors of a division finds that any Regulation or Instruction of the Department is not being properly carried out, he shall forthwith report specially on such cases to the Minister.

11. Each inspector shall forward a copy of his ordinary inspectional report on the prescribed official form to the Minister within one week after the visit.

12. The chief inspector of public and separate schools shall be the supervising inspector of the English-French schools.

13. (1) No teacher shall be granted a certificate to teach in English-French schools who does not possess a knowledge of the English language sufficient to teach the public and separate school course.

(2) No teacher shall remain in office or be appointed in any of said schools who does not possess a knowledge of the English language sufficient to teach the public and separate school course of study.

14. The legislative grants to the English-French schools shall be made on the same conditions as are the grants to the other public and separate schools.

15. On due application from the School Board and on the report of all the inspectors approved by the chief inspector, an English-French school which is unable to provide the salary necessary to secure a teacher with the aforesaid qualifications shall receive a special grant in order to assist it in doing so.

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†93. In and for each Province the Legislature may exclusively make laws in relation to education, subject and according to the following provisions:—

1. Nothing in any such law shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons have by law in the Province at the Union.

2. All the powers, privileges, and duties at the Union by law conferred and imposed in Upper Canada on the separate schools and school trustees of the Queen's Roman Catholic subjects shall be and the same are hereby extended to the dissentient schools of the Queen's Protestant and Roman Catholic subjects in Quebec.

3. Where in any Province a system of separate or dissentient schools exists by law at the Union or is thereafter established by the Legislature of the Province, an appeal shall lie to the Governor-General in Council from any Act or decision of any Provincial authority affecting any right or privilege of the Protestant or Roman Catholic minority of the Queen's subjects in relation to education.

4. In case any such Provincial law as from time to time seems to the Governor-General in Council requisite for the due execution of the provisions of this section is not made, or in case any decision of the Governor-General in Council on any appeal under this section is not duly executed by the proper Provincial authority in that behalf, then and in every such case, and so far only as the circumstances of each case require, the Parliament of Canada may make remedial laws for the due execution of the provisions of this section and of any decision of the Governor-General in Council under this section.

strenuous argument of counsel for the defence, these sub-sections in no way affect the issues in this case, for the manifest reason that the jurisdiction of the Dominion is supervisory or remedial only, and the powers conferred have not been exercised or even invoked; and until invoked and acted upon they in no way impair or encroach upon Provincial jurisdiction. Neither, on the other hand, is the objection that notice has not been given to the Minister of Justice, well taken. There is no Act or action of the Dominion Government or Parliament attacked; no question arises as to conflicting jurisdiction. If the Ontario Legislature had not power to enact the law complained of, the Dominion Parliament would be equally powerless so to enact.

The question to be determined, and the only question, is, to my mind, a very simple one: Have the constitutional rights and privileges guaranteed by sub-sec. 1 of sec. 93 of the British North America Act, 1867, been contravened? If they have not, there is an end to the defendants' whole contention, there is no other possible argument open to them. If they have, the law is *ultra vires* and nugatory; for no legislative body in Canada has power to make any law which "shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons have (had) by law in the Province at the Union:" sub-sec. 1 of sec. 93 of the British North America Act.

The outstanding difference between this and the provisions of sub-secs. 3 and 4 is manifest, even on a casual reading of sec. 93. This is a distinct and positive limitation upon legislative action; and, subject to this, and to this limitation only—and in default of the exercise of federal jurisdiction—the unfettered direction and control of education within the Province is committed to the Legislature of Ontario.

This is the conclusion I come to upon a close and thoughtful reading of the relevant provisions of the British North America Act, and, so far as I can judge, it does not conflict with anything decided in *City of Winnipeg v. Barrett*, [1892] A.C. 445, *Brophy v. Attorney-General of Manitoba*, [1895] A.C. 202, *Maher v. Town of Portland* (1874), 2 Cart. 486 (note), or any other of the cases referred to, or of which I have knowledge, decided under the Act.

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The defendants must justify under the limitations above quoted, if at all. Have they done this?

The Roman Catholic separate schools of Ottawa are undoubtedly “denominational schools” within the meaning of this limitation. I am of opinion too that the French-Canadian supporters of the separate and public schools of Ontario are a “class of persons” within the meaning of that clause; and, if they are not concluded by the *Barrett* case—and I am sure that they are—the defendants may, I think, fairly argue that denial of the use of the French language in the way insisted upon by the defendants prejudicially affects the French-Canadian supporters of these schools. But this, at the most, is all that has been shewn, and this is not enough.

I have not overlooked that it was shewn, or attempted to be shewn, by verbal testimony and records of the Department, that, prior to Confederation, in isolated instances here and there, the use of the French language was permitted (or not actively opposed) to an extent not sanctioned by the law of the Province as it now is; but it is not pretended that this right or quasi-right or privilege or indulgence was secured to any class of persons by any law whatever of the then Province of Upper Canada at the Union.

The result is, that the defendants have wholly failed to shew that Instruction or Regulation 17 of June, 1912, or of August, 1913, of the Department of Education for Ontario, or the manner in which these Instructions have been or are being administered by the Department, prejudicially affect any right or privilege with respect to denominational schools which the defendants as a class of persons had by law in the Province at the Union; and the result is, too, that it does not appear that these Instructions or the manner of their administration or the statutes upon which they are founded are *ultra vires* of the Provincial Legislature. It follows, as a consequence, of course, that they must be obeyed. That they have been flagrantly disregarded—defiantly and ostentatiously repudiated and set at naught—by a majority of the Ottawa Separate School Board, is not and could not be denied. It would serve no useful pur-

pose to particularise the evidence of this. It is for the Department, the law being declared, to see that the law is obeyed.

Without, however, attempting or desiring to make an exhaustive list of violations of the School Law, it may conduce to clearness if I mention a few instances in which I find violations established by the evidence:—

1. The use of French as the language of communication and instruction beyond Form I., and as a subject of study for more than an hour a day in a class-room, without the consent of the Chief Inspector.

2. The employment of unqualified teachers.

3. Obstructing the inspectors in the discharge of their duties and preventing inspection of the schools.

4. Wilful failure to keep the schools open during the time prescribed by law, and in fact closing them and keeping them closed at and after the commencement of the school year 1914-15.

5. Wilfully omitting properly to equip and carry on the schools by the employment of qualified teachers, and, on the contrary, dismissing from the schools twenty or more satisfactory, competent, and qualified teachers.

NOTE: Want of means cannot be invoked as a justification. The Department specifically agrees to make an adequate supplementary grant to meet any difficulty in the case of English-French schools: paragraph 15 of Instruction 17, August, 1913. This was not applied for.

6. Defiant refusal to conduct the schools according to law or submit to the Regulations, and so forfeiting or suspending payment of their share of the Government grant; and, by publication of their resolutions and declarations, fomenting discontent among the school supporters and encouraging the insubordination of the pupils.

The other issues to be dealt with are, in a sense, subordinate to the question just disposed of, but not wholly so.

As to the passing of the money by-law and the disposal of debentures under it, the defendants urge the need of money, but have not shewn any disposition to avail themselves of the suggestions I made at the trial to meet and overcome the suggested difficulties.

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Leaving out of sight, of course, minor derelictions, a Board should not be permitted to mortgage the resources of the rate-payers or launch out into heavy capital expenditure while refusing to conduct the schools according to law. However much may be said, and a great deal can be said, in excuse for men who feel, as no doubt some of these defendants conscientiously felt, that the use of their mother tongue was being unfairly denied them, the weapons they used, the persistent engagement of unqualified teachers, their attempt to discharge a large body of qualified teachers, to the great prejudice of the schools, their denial of the right of inspection, their unjustifiable treatment of Inspector Summerby—for, although they may not have directly initiated this flagrant act of insubordination, yet their openly declared hostility to the Regulations undoubtedly conducted to it—that they knew it was contemplated, that they did nothing to prevent it, and that they condoned and concurred in it, is the least that can be said—their unseemly, unnecessary, and wholly unwarranted action in what amounted to “a declaration of war,” by posting their defiance of the Department in the class-rooms to thousands of school children, and finally the arbitrary closing of the schools, are entirely different matters, and do not find ready justification or excuse. It is to be hoped that before long the Board may recognise the wisdom of resuming the exercise of its functions according to law; but in the meantime, or for so long as my judgment remains unreversed, the injunction restraining the passing of the by-law in question must be continued.

The injunction will also be continued and made perpetual to prevent the employment or payment of unqualified teachers or any departure from the course or method of instruction prescribed by the Department of Education, and from, directly or indirectly, preventing the regular and lawful inspection of the schools.

I have already, by an interim judgment, declared that the Chairman of the Board had no power to discharge teachers as he purported to do, and that these teachers were not legally discharged. In this connection I gave liberty to the parties to

amend the pleadings, and this has been done. I was asked at the trial—and it was urged again upon the argument—to go further, and declare that these teachers are entitled to be paid according to the terms of their contracts respectively. This I cannot do. These men are not parties to this action. Their contracts are not before me. With their salaries I have no concern.

I reaffirm my former judgment, and declare that the resolutions under which the Chairman purported to act conferred upon him no right to dismiss or engage teachers. This is a function of the Board, and cannot be delegated. My former judgment, so far as it continues applicable, will be taken as repeated here.

In the pleadings the plaintiffs ask that the members of the Board who occasioned this action be made personally responsible for costs and any loss they have occasioned, with a reference to ascertain the amount; and, though this branch of the claim was not referred to upon the argument, I should consider it, and I have given it a good deal of anxious thought. There may be technical or legal objections; but, altogether aside from this, I am not disposed to make this somewhat unusual and drastic order.

Other issues have grown out of them, but at the beginning the controversy centred around two questions naturally regarded as transcendently important—language and religious faith; and in the attitude the majority assumed they had the support of a great many—and it may be a majority—of the ratepayers of the separate schools. Over-zealous and injudicious councillors, too, were not wanting to spur them on to make extravagant demands. One gentleman, whose position would argue wisdom and a moderation, unfortunately not in evidence, modestly writes: “As priest of this parish, I have charge of these families and their interests, *both national and religious*. The wish of the parents, as is my wish, is that French be taught in our schools to our children as heretofore. I protest against the unjust and outrageous appointment of Protestant inspectors. If need be, it will be I myself who will cause the children to leave the school if the inspector insists on wishing to make a visit.” The italics are mine; the translation is as given and accepted at the trial.

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The attachment of the French-Canadian people, including the French-speaking trustees, to their mother tongue, is easily understood, and is not to be ruthlessly condemned. That in all sincerity they should conceive it to be an imperative duty to guard what they regard as rights, I can well understand. The maintenance of our religious rights is admittedly of paramount importance to us all. The tense feeling, inevitably engendered by the discussion of a dual language and its evil consequences, is unfortunately not a novel phase of our national development. I should be careful not to accentuate this unhappy strife. If the judgment I have just pronounced is right, the defendants had no just ground for complaint, and I have so declared. The tactics resorted to were unfortunate and illegal, and I have condemned them. They cannot be too severely condemned. But, except in the matter of closing the schools and attempting to discharge the teachers, it has not been shewn that these trustees did not act honestly, conscientiously, and in good faith; and, short of this, I am not prepared to penalise them by declaring a personal liability for costs and damages. I will make no order under this prayer of the statement of claim. The plaintiffs may withdraw it or have their rights, if any, reserved, if they deem it necessary or desire to do so.

There will be judgment for the plaintiffs against the defendant Board with costs, declaring:—

1. That the Instructions or Regulations in the pleadings mentioned and the Acts and proceedings sanctioning them are *intra vires* of the Provincial Legislature, apply to and bind the defendants, and have been and are being disobeyed.

2. That the defendants have not been and are not conducting the schools under their charge according to law.

3. That the resolutions of the defendants purporting to delegate to the Chairman power to discharge, select, and engage teachers, were *ultra vires*, that the notices to teachers in pursuance thereof were unwarranted, and that the agreements with these teachers were not thereby terminated.

4. That it is a statutory duty of the defendants to see that

the schools under their charge are conducted according to the provisions of the Separate Schools Act and the Instructions and Regulations of the Department of Education, to maintain order and discipline in these schools, and to permit and facilitate their inspection; and the defendants neglected and violated their statutory obligations in this regard.

5. And there will be judgment for an injunction in the terms generally and to the purport and effect of the interim injunction granted in this action by the Chief Justice of the King's Bench on the 29th April, 1914, and, in addition, restraining the defendants from directly or indirectly obstructing, or retaining in their employment or paying the salary of any teacher who shall so obstruct, the inspectors appointed by the Department from visiting and inspecting the schools in their charge, and ordering the Board to provide for and facilitate the orderly and efficient inspection of the schools from time to time according to law.

The judgment as finally settled on the 17th December, 1914, was in the same terms as above set out, except that the 5th paragraph was altered and a 6th paragraph was added as follows:—

5. And let judgment also be entered for a permanent injunction, in the terms generally and to the purport and effect of the interim injunction granted in this action by the Chief Justice of the King's Bench on the 29th April, 1914, but subject to such order as the Court may hereafter see fit to make, upon it being shewn that the defendants are then conducting and intend to conduct the schools according to law, and, in addition, restraining the defendants from directly or indirectly obstructing or preventing, or retaining in their employment or paying the salary subsequently accruing of any teacher who shall obstruct or prevent, the inspectors appointed by the Department from visiting and inspecting the schools in their charge, and ordering the defendants to provide for and facilitate the orderly and efficient inspection of the schools in their charge according to law.

6. Reserving to the supporters of the Ottawa Roman Catholic

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separate schools, and each of them, any right they may have to bring actions as they may be advised to establish a personal liability of any member or members of the defendants' Board for loss or damage alleged to have been occasioned to these schools or their supporters through the misconduct or default of such members.

[APPELLATE DIVISION.]

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JOHN MACDONALD & CO. LIMITED v. TEW.

Nov. 30.

Land Titles Act—Mortgage in Form Prescribed by Short Forms Act—Inability to Register—Deed of Assignment for Benefit of Creditors—Registration of—Priorities—R.S.O. 1914, ch. 126, secs. 30 (2), 45, 115—Form of Judgment—Rectification of Records—Declaration of Trust—Costs.

In November, 1910, the registered owner of land conveyed it by way of mortgage to the plaintiffs as security for a debt—the mortgage-deed being in the form provided by the Short Forms of Mortgages Act. The land having been brought under the Land Titles Act, the mortgage could not be registered, and no registration of a charge was effected; in 1912, the plaintiffs procured the mortgagor to execute an instrument in the proper form under the Act. In the meantime the mortgagor had made an assignment to the defendant for the benefit of creditors, and the defendant had registered the assignment against the land mortgaged to the plaintiffs. In this action, the plaintiffs asked for a declaration that their mortgage was entitled to priority over the assignment; for a direction that the assignment be removed from the register or otherwise postponed to the mortgage; and for costs. At the trial judgment was given in favour of the plaintiffs: (1) declaring that their mortgage was entitled to priority over the assignment, and directing that it be so recorded, and the register and records in the Land Titles office be rectified accordingly; (2) requiring the plaintiffs to value their security in connection with their claim against the estate of the mortgagor in the hands of the defendant; (3) directing that the plaintiffs be entitled to add the costs of the action to their claim against the estate; and (4) directing that the defendant's costs of the action should be paid out of the estate:—

Held, upon appeal, affirming the judgment, that the plaintiffs were entitled to priority, the defendant not being a transferee for value: sec. 45 of the Land Titles Act, R.S.O. 1914, ch. 126.

Per MULOCK, C.J.Ex., and CLUTE, J., that sec. 115 of the Act was applicable; and that the judgment should be varied by directing that, instead of recording the mortgage-deed in the books of the Land Titles office as a link in the chain of title, it should be deposited with the proper Master of Titles, and he should enter the plaintiffs on the register as owners of a charge, with such particulars to be taken from the mortgage-deed as are required by sub-sec. 2 of sec. 30 of the Act.

Per MACLAREN, J.A., and RIDDELL, J., that, in view of the many difficulties attending amendment of the records of a Master of Titles, it was not wise to order any change under sec. 115; the judgment should be varied by substituting for the direction to amend the records a declaration that the defendant was a trustee for the plaintiffs to the extent of their mortgage, in priority to the trusts of his assignment.

The members of the Court not being agreed as to the variation to be made, the appeal was dismissed with costs.

APPEAL by the defendant from the judgment of WINCHESTER, Senior Judge of the County Court of the County of York, in favour of the plaintiffs, in an action in that Court, tried by him without a jury.

The plaintiffs by their statement of claim alleged that in 1911 Sarah A. Campbell made an assignment for the benefit of her creditors to the defendant, who thereupon registered the assignment against land owned by her, which had been brought under the Land Titles Act; that on the 10th November, 1910, the plaintiffs, being creditors, obtained from her a mortgage for \$600 on this lot; but, as it was in the form given by the Short Forms of Mortgages Act, they were unable to record it; that, after some time, they succeeded in getting her to execute a mortgage in the proper form (23rd August, 1912), but could not record this by reason of the assignment to the defendant; that the plaintiffs then endeavoured to induce the defendant to recognise their rights as mortgagees prior to the assignment, but he refused to do so. The plaintiffs claimed: (1) a declaration that their mortgage was entitled to priority over the assignment; (2) a direction that the assignment be removed from the register or be otherwise postponed to the mortgage; (3) costs.

The County Court Judge gave judgment declaring that the plaintiffs' mortgage was entitled to priority to the deed of assignment for the benefit of creditors made by Sarah A. Campbell to the defendant; directing that it be so recorded, and the register and records in the Land Titles office rectified accordingly; directing that the plaintiffs should value their security in connection with their claim against the estate of Sarah A. Campbell; that they should be entitled to add their costs of this action to their claim against the estate; and that the defendant's costs of the action should be paid out of the estate.

October 27. The appeal was heard by MULOCK, C.J.Ex., MACLAREN, J.A., CLUTE and RIDDELL, JJ.

G. G. S. Lindsey, K.C., for the appellant, argued that, granting that under the statute there is no question as to the priority of a valid charge over a previously registered assignment for

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the benefit of creditors, the instrument for which the plaintiffs claim priority in this action is not entitled thereto, and has no effect as a charge. It did not conform to the Land Titles Act, the forms used in which are mandatory. The plaintiffs cannot avail themselves of the rights and powers vested in a mortgagee at common law, and incidental to his estate, but only of such as rest directly upon the provisions of the statute itself: *Smith v. National Trust Co.* (1912), 45 S.C.R. 618, 639, 640. The plaintiffs' position is that of a simple contract creditor: *Gilbert v. Reeves & Co.* (1911), 4 Sask. L.R. 97, 102. The following authorities were also referred to: *Craig v. McKay* (1906), 12 O.L.R. 121, 125; *Re M. Rumely Co. and Registrar of the Saskatoon L.R. District* (1911), 17 W.L.R. 160; *In re North-West Telephone Co. Limited* (1909), 2 Sask. L.R. 379.

A. C. McMaster, for the plaintiffs, respondents, argued that the judgment of the learned trial Judge was right and should be affirmed. The plaintiffs' rights are clear under sec. 45 of the Land Titles Act, R.S.O. 1914, ch. 126, and sec. 115* indicates the method in which they should be secured.

Lindsey, in reply, argued that sec. 115 of the Act did not apply to the present case, and referred to Thom on the Canadian Torrens System, pp. 129, 130.

November 30. MULOCK, C.J.Ex.:—One Sarah A. Campbell was the registered owner of lot No. 88 in the village of Cobalt, in the district of Nipissing, and on the 10th November, 1910, conveyed the same, and other lands, by way of mortgage, in the form provided by the Short Forms of Mortgages Act to the respondent company as security for a debt owing by her.

The title to the property being under the Land Titles Act, the mortgagees were advised that they could not register their mortgage, and, on or about the 23rd August, 1912, obtained from the mortgagor a transfer of the property under the Land Titles

*115. Subject to any estates or rights acquired by registration in pursuance of this Act, where any Court of competent jurisdiction has decided that any person is entitled to any estate, right, or interest in or to any registered land or charge, and as a consequence of such decision the Court is of opinion that a rectification of the register is required, the Court may make an order directing the register to be rectified in such manner as may be deemed just.

Act; but, prior to making this transfer, the mortgagor had made an assignment of her property to the appellant for the benefit of her creditors, and that assignment had already been registered against the property.

After some unsuccessful negotiations with the appellant for the purpose of obtaining from her a recognition of the respondent company's claim for priority in respect of the mortgage security, the company brought this action to enforce the same. It was tried by His Honour Judge Winchester, Senior Judge of the County Court of the County of York, who gave judgment declaring that the mortgage ranked prior to the deed of assignment for the benefit of creditors, and directing that it be so recorded, and that the register and records in the Land Titles office be rectified accordingly. From that judgment the defendant appeals.

In my opinion, the decision of the learned Judge was substantially correct, and should be modified in one formal respect only. The appellant is not a transferee for value; and, by sec. 45 of the Land Titles Act, R.S.O. 1914, ch. 126, "a transfer of registered land, made without valuable consideration, shall be subject, so far as the transferee is concerned, to any unregistered estates, rights, interests, or equities subject to which the transferor held the same," etc.

The Land Titles Act deals simply with the question of registration; it does not interfere with any common law or other rights of an owner of land to mortgage the same by instrument not capable of registration under the Land Titles Act. The appellant, being a volunteer, acquired by the transfer from the mortgagor to him only the mortgagor's interest, or, in other words, took subject to the respondent company's lien: *National Bank of Australasia v. Morrow* (1887), 13 V.L.R. 2; *Jellett v. Wilkie* (1896), 26 S.C.R. 289.

The mortgage in question purports to convey the legal estate; and, having regard to the fact that, under the Land Titles Act, a security on land is to be created by a charge, the legal estate remaining in the owner, the proper course is, instead of recording the instrument in the books of the office as a link in the chain of

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title, to deposit it with the proper Master of Titles; and thereupon that officer should enter the respondent company on the register as owners of a charge, with such particulars to be taken from the mortgage as are required by sub-sec. 2 of sec. 30 of the Land Titles Act.

Subject to this variation, the appeal is dismissed with costs.

CLUTE, J.:—I am of the same opinion. The defendant admits that the plaintiffs are the mortgagees of the lands in question. The defendant is assignee for the benefit of creditors under an assignment made subsequent to the plaintiffs' mortgage. The plaintiffs' mortgage, not being in the form required, could not be registered under the Land Titles Act. To cover this defect, a subsequent conveyance was obtained from the mortgagor. Even if this could be registered, it would shew a title in the defendant before registration. The plaintiffs' title to the land is beyond doubt. It is purely a matter of registration. In my opinion, sec. 115 of the Land Titles Act was passed expressly to cover a case like the present. The trial Judge properly held that the plaintiffs were entitled as mortgagees in fee. The register does not shew this, and it should be rectified in the manner suggested in the judgment of the Chief Justice.

With this variation, the appeal should be dismissed with costs.

RIDDELL, J.:—The statement of claim alleges that in 1911 Sarah A. Campbell made an assignment for the benefit of her creditors to the defendant, who thereupon registered the assignment against certain lands of hers under the "Torrens title;" that on the 10th November, 1910, the plaintiffs, being creditors, obtained from her a mortgage for \$600 on this lot; but, as it was in the form under the Short Forms of Mortgages Act, they were unable to record it. After some time, they succeeded in getting her to execute a mortgage in the proper form—the 23rd August, 1912—but could not record this by reason of the assignment to the defendant. They then endeavoured to have the defendant recognise their right as mortgagees prior to his assignment, but he refused. They, therefore, claimed: (1) a declaration that their "said mortgage" is entitled to priority over the assign-

ment; (2) a direction that the said assignment be removed from the register or otherwise postponed to the "said mortgage;" (3) costs.

The defendant in his statement of defence admits the assignment to him, and the mortgage of the 10th November, 1910, to the plaintiffs, but says that the assignment covers other lands in respect to which the plaintiffs claim no priority; that such a mortgage the Master of Titles is bound to record, and the plaintiffs should have proceeded to compel him to do so; that "if, as the plaintiffs allege, the said mortgage was given to secure the plaintiffs as creditors, they should have so stated in the proof of claim" against the estate, but that they swore that they had no security, and that they had been paid a dividend on the faith of this affidavit; that the defendant now for the first time learns of the existence of this security, and he calls upon the plaintiffs to value the same; he "admits as a matter of law that an assignee in insolvency does not acquire priority over a previous unregistered deed;" he submits that, "on a sale of property under such a deed, a purchaser must so admit as the defendant does in paragraph 7" (the last-mentioned paragraph), and further says that "the proper Master of Titles must so admit as the defendant does in paragraph 7 hereof set out." He submits that the only deed to which his assignment is subject is that of the 10th November, 1910 (he says "that mentioned in paragraph 2," but this is a clerical error for "paragraph 3"); that the charge obtained in August, 1912, is a different contract from that of the 10th November, 1910. He denies that he has ever refused to recognise the right of the plaintiffs; says that the plaintiffs never submitted a proper consent for him to sign; and says that, subject to the mortgage of the 10th November, 1910, he is the owner of the equity of redemption in the land.

This tortuous, complicated, and largely irrelevant defence covers about three pages of typewriting. It seems to have been intended to prevent, as no doubt it did prevent, a motion for judgment upon the pleadings, to force a trial, and prevent a great saving of costs; a simple, plain admission of the plaintiffs' rights is avoided, and a general statement of general law substituted.

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The plaintiffs join issue.

After a trial before His Honour Judge Winchester, the following judgment was entered:—

“1. This Court doth declare that the mortgage mentioned in paragraph 3 of the plaintiffs’ statement of claim herein, and made on the 10th day of November, 1910, by Sarah A. Campbell to John Macdonald & Company Limited, of the city of Toronto, on the lands described as lot 88 on the east side of Birch avenue, in the town of Cobalt, according to plan number 52, is entitled to priority to the deed of assignment for the benefit of creditors made by the above-named Sarah A. Campbell to Richard Tew, and mentioned in paragraph 2” (this should be “3”) “of the plaintiffs’ statement of claim, and directs that it be so recorded and the register and records in the Land Titles office be rectified accordingly.

“2. And this Court doth order that the plaintiffs do value their security in connection with their claim against the estate herein on or before the 30th day of September, 1914.

“3. It is further ordered that the plaintiffs be entitled to add the costs of this action to their claim against the estate.

“4. And it is further ordered that the defendant’s costs of this action be paid out of the said estate.”

The defendant now appeals.

I had and have the misfortune not to be able to understand precisely what position the defendant desired to take in some respects, but one thing was made perfectly clear, i.e., that he does not now dispute that the unregistered mortgage in question here takes priority over his assignment. What he now claims is that, as he says in the last paragraph of his statement of defence, he is the owner of the equity of redemption subject to the said mortgage. In this the plaintiffs agree, so that the declaration of right in the first part of the judgment contained is unexceptionable; the defendant, indeed, says it is unnecessary, but that is another matter.

Again, the defendant contends that the order to record that mortgage is wrong; and in that the plaintiffs concur.

There are only two matters that are open: (1) what order, if any, should be made under sec. 115 of the Land Titles Act, R.S.O. 1914, ch. 126, or otherwise; (2) costs.

In view of the many difficulties attending amendment of the records of a Master of Titles, I think it not wise to order any change under sec. 115, when all the advantage derivable from that course can be easily and simply obtained by declaring the defendant trustee for the plaintiffs to the extent of their mortgage of November, 1910, in priority to the trusts of his assignment.

Then as to costs. On the 24th February, 1914, the plaintiffs' solicitors wrote to the defendant saying that they had already pointed out to him that the plaintiffs had in 1910 obtained a mortgage from Sarah A. Campbell which they were unable to register, but that recently they had procured a mortgage in proper form, and "we did not consider that your assignment could avail against this." The solicitors go on to say that the plaintiffs had sold the property and wanted to get rid of the assignment, and ask an answer whether the defendant will release the property. The very same day, the defendant answered: "On statement of facts made by you, we cannot see our way to allow you to have priority over assignment." After waiting some twenty days, the plaintiffs issued their writ. That the plaintiffs were justified in asking a declaration of their right, is clear. That the defendant in denying the right now admitted was wrong, is equally clear.

Then, when it came to the pleadings, the defendant filed a long, involved, and argumentative statement of defence, instead of plainly and unequivocally admitting the plaintiffs' claim, so that a motion for judgment could be made. I think the County Court Judge was not at all too severe on the defendant in ordering that the plaintiffs should have their costs; but rather fault might be found that they add these costs to their claim, and thereby obtain only a dividend on them.

As to the costs of the appeal, the plaintiffs were substantially right; the form of the judgment was wrong. This Court has

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recently decided, in *Watson v. Jackson* (1914), 31 O.L.R. 481, a similar case, that the respondent should have his costs. That, I think, should be directed in this case also.

Some argument took place before us on the effect of the plaintiffs receiving a dividend on the hypothesis that they had no security; but there is no evidence of that fact, if it is a fact; and the principle of *Clark v. Phinney* (1896), 25 S.C.R. 633, and *Steen v. Steen* (1907), 9 O.W.R. 65, 10 O.W.R. 720, cannot be made to apply here.

MACLAREN, J.A., agreed with RIDDELL, J.

[In the result, the Court being divided as to the variation, the appeal was dismissed with costs.]

[APPELLATE DIVISION.]

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Nov. 30.

CAMPBELL FLOUR MILLS CO. LIMITED v. BOWES.

CAMPBELL FLOUR MILLS CO. LIMITED v. ELLIS.

Contract—Breach—Defective Material Used in Building by Contractor—Want of Supervision by Architect—Right of Action against—Implied Contract—Separate Actions by Building Owner against Contractor and Architect—Actions Tried together and Consolidated—Judgment against both Defendants for same Sum—Damages—Separate Contracts—Merger of Cause of Action in Judgment—Consolidation Order—Variation—Joinder of Parties—Rules 67, 134, 320—Rights of Defendants inter se.

The plaintiffs employed a firm of architects to draw plans and specifications for a building and to superintend the construction thereof; and entered into a contract with a firm of builders to erect the building. The plaintiffs brought an action against the builders for breach of the building contract by placing defective materials in the building, and another action against the architects for negligence in supervising the construction by reason of which the defective material was not condemned. The actions were begun on the same day. There was a written contract with the builders, but not with the architects:—

Held, that the architects failed to perform their elementary duty to exercise a sufficient supervision over the building, and so broke the contract implied from their employment; damage followed the breach immediately, by the builders placing defective materials in the building; and for this an action lay against the architects.

Chambers v. Goldthorpe, [1901] 1 K.B. 624, distinguished.

Rogers v. James (1891), 8 Times L.R. 67, and *Jameson v. Simon* (1899), 1 F. (Ct. of Sess. Cas., 5th series) 1211, followed.

The two actions were consolidated by the trial Judge, and tried as one action, and judgment was given against the defendants (i.e., both sets of defendants) for one sum of money as damages. Upon appeals by both sets of defendants, the builders admitted their liability, and complained only of the quantum of the damages, while the architects contended that the plaintiffs were bound to elect which set of defendants they would sue, and that a judgment against the builders would bar an action against the architects:—

Held, that the two contracts were separate and distinct; the builders broke theirs when they put bad material into the building; at the same moment the architects broke theirs when they allowed this to be done; the damages were the same under either contract, but that was immaterial; the contracts were not the same; if judgment were obtained in the action against the builders, it would destroy their contract *quoad hoc*, but it could not affect the contract of the architects—that *non transivit in rem judicatam*, but remained a simple contract; therefore, the plaintiffs were entitled to judgment against both sets of defendants, and the judgment appealed from was right.

Seemle, that, if the full amount of the damages were realised out of the builders, no action (except perhaps for nominal damages) would lie against the architects—but that would be because the plaintiffs had suffered no damage from the default of the architects.

Discussion of the rule of law that where a judgment is obtained every cause of action upon which the judgment is based *transit in rem judicatam*, and review of the authorities.

Held, that the judgment was technically wrong in “consolidating” the actions: in strictness actions can be consolidated only when they are between the same parties; and it is in this sense that Rule 320 provides for consolidation by order of the Court.

The actions were begun before the present Rule 67 came into force; had they been begun after that Rule had become effective, the builders and architects might have been joined as defendants in one action; and, that being so, Rule 134 empowered the Court to add either set of defendants as defendants in one of the actions, and dispose of all matters therein, staying the other action; and the judgment should be varied by so providing, unless all parties agreed to another course which was suggested. In either case, the rights of the defendants *inter se* should be reserved.

APPEALS by the defendants in both actions from the judgment of LATCHFORD, J., at the trial without a jury, consolidating the two actions and directing that the plaintiffs should recover from the defendants the sum of \$19,500, subject to certain deductions.

The first action was against Bowes & Francis, the contractors for the erection of a building for the plaintiffs, for breach of contract; the second action was against Ellis & Connery, the architects employed by the plaintiffs to superintend the building, for negligence.

June 16. The appeals were heard by MULOCK, C.J.Ex., MAGEE, J.A., RIDDELL and SUTHERLAND, JJ.

I. F. Hellmuth, K.C., and *W. A. McMaster*, for the defendants Ellis & Connery, appellants. The learned trial Judge had no power to consolidate the two actions. The actions were begun before the new Rule 67 came into force. The former Rule 186 did not allow of consolidation where there were, as here, two separate and distinct contracts: *Martin v. Martin & Co.*, [1897]

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1 Q.B. 429; *Crane v. Hunt and Wayper* (1895), 26 O.R. 641; *Morel Brothers & Co. Limited v. Earl of Westmorland*, [1904] A.C. 11; *Lee v. Arthur* (1908), 100 L.T.R. 61; *Kuula v. Moose Mountain Limited* (1912), 26 O.L.R. 332; *Hinds v. Town of Barrie* (1903), 6 O.L.R. 656; *Andrews v. Forsythe* (1904), 7 O.L.R. 188. The plaintiffs were bound to elect which set of defendants they would sue. The architects were not bound to exercise any supervision other than they did, and they would not be responsible for negligence in the absence of fraud or collusion: *Chambers v. Goldthorpe*, [1901] 1 K.B. 624; *Jameson v. Simon* (1899), 1 F. (Ct. of Sess. Cas., 5th series) 1211. The plaintiffs should have employed a clerk of works. In any event, the damages allowed were too great, as the learned trial Judge estimated them on the basis of removing all the building above the bad belt, as well as the bad belt, whereas the evidence shewed that the bad belt could be removed, and good concrete inserted in its place.

Featherston Aylesworth, for the defendants Bowes & Francis, appellants, contended that the damages were assessed at too large a sum.

H. H. Dewart, K.C., and *E. T. Coatsworth*, for the plaintiffs, respondents. The two causes of action arose out of the one transaction, and so were rightly consolidated under Rule 67. The evidence shews that the architects were negligent in supervision, and so liable in damages: *Hudson on Building Contracts*, 3rd ed., vol. 1, pp. 31, 154, 155; vol. 2, pp. 64, 159; *Halsbury's Laws of England*, vol. 3, paras. 612, 628; *Leicester Guardians v. Trollope* (1911), 75 J.P. 197; *Jameson v. Simon*, *supra*; *Robins v. Goddard*, [1905] 1 K.B. 294.

November 30. The judgment of the Court was delivered by RIDDELL, J.:—The plaintiffs, a milling company, employed the defendants Ellis & Connery, a firm of architects, to draw plans and specifications for a building, a feedmill and elevator, of reinforced concrete; and they entered into a contract with Bowes & Francis, a firm of builders, to erect the same. The contract and specifications are well drawn, and, had they been adhered to, the plaintiffs would have had a satisfactory building.

The defendants Ellis & Connery were employed by the plaintiffs as architects to superintend the building, etc.; but, while the architects well knew that in every case contractors must be watched (pp. 171, 172, 173, 191 of the evidence), they kept no man on the work, and the only supervision given was by one of them for a short time four or five mornings in the week. No laboratory tests were made of the concrete, although that was stipulated for in the specifications; the very imperfect test that was used was applied only four times; no means was taken to find out what quantities the contractors were actually using when the architect was not present nor the kind of material, although the architect had found it necessary at different times to reject the gravel which the contractors were intending to use (p. 176). In fact the architects seem to have trusted almost implicitly to the honesty and capacity of the contractors.

What might not unnaturally have been expected, occurred. After a fairly satisfactory belt of about fifteen feet had been built, a belt of about twenty feet followed which was admittedly defective and dangerous. (On this again was built a reasonably satisfactory superstructure.)

While the work was going on, the architects gave progress certificates from time to time, and these were paid—\$18,119. The plaintiffs brought an action against the contractors and another against the architects. The writs are tested the same day, August 16th, 1913, and are in the order above given.

In the former action the claim is for breach of the building contract; in the latter for “negligence . . . in supervising the construction . . . negligence and improper supervision.”

The contractors plead that the work was done to the satisfaction of the architects, and other defences unnecessary to notice, as they are not relevant on this motion.

The architects plead that they were not bound to give continuous superintendence, and that the damage occurred owing to the plaintiffs’ failure to employ a clerk of the works and to provide continuous superintendence. They say that the work, etc., was proper so far as they were able to ascertain from their superintendence; and plead to damages.

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When the actions were ripe for trial, and after the coming into force of the new Rules, a motion was made by the plaintiffs to consolidate the two actions. This was referred by the Master in Chambers to the trial Judge. At the trial, the motion was renewed before Mr. Justice Latchford. Counsel for the architects took objection. The following took place:—

“HIS LORDSHIP: Surely he can sue the two if both have caused that damage.

“MR. HELLMUTH: He can sue the two in one action; but, if he has chosen to bring separate actions against them, then, I submit, he cannot consolidate those actions. . . .

“HIS LORDSHIP: Well, then, with a view to disposing of the two expeditiously, I should think that the evidence given in one, so far as applicable, should be applied to the other.

“MR. HELLMUTH: That is not the point I am objecting to. I am objecting to a consolidation.”

And later:—

“HIS LORDSHIP: . . . I think these are two cases which should be tried together.

“MR. HELLMUTH: If your Lordship so holds, it is all right, but I take my objection, my Lord, to their being tried together. My submission is that the plaintiff, having brought two actions for the same cause, cannot now consolidate those actions.

“HIS LORDSHIP: There are two different causes of action. I understand the situation, and will try them together.”

The trial proceeded accordingly. It was abundantly proved that the belt of some twenty feet was defective and dangerous, and that this condition should have been discovered at the time by the architects. The architects are right in saying that it was the neglect of continuous supervision which caused the damage; it is clear, however, from the evidence that the default was not that of the plaintiffs, but of the architects.

Some question was raised before us as at the hearing as to the proper method of measuring the damages; but we disposed of that adversely to the defendants.

The two points mainly urged by the architects were: (1) that they were not called upon to exercise any supervision other than what they did; and (2) that there should be no consolidation.

As to the first point, *Chambers v. Goldthorpe*, [1901] 1 K.B. 624, was cited as laying down the rule that an architect is not liable to an action for negligence in the exercise of his functions. An examination of that case will shew the inaccuracy of the contention. By clause 20 of a contract, an architect was to certify to "the final balance due or payable to the contractor," the certificate "to be conclusive." In the Court of Appeal, the majority, A. L. Smith, M.R., and Collins, L.J., held (Romer, L.J., dissenting), that the architect was not liable to an action at the instance of the owner for negligence in exercising his function of determining the amount. This is put explicitly on the ground that in that respect the architect was an arbitrator. But the Master of the Rolls said (p. 634): "I have no doubt that, under many clauses of the building contract . . . the plaintiff acted merely as agent for the . . . building owner, for the purpose of seeing that the builder did his work properly, and used proper materials. As regards matters in which the plaintiff was employed merely as agent for the building owner, he was to protect his interests adversely to the builder, and the plaintiff would be liable to an action by his employer, if he acted negligently in such matters." Collins, L.J. (p. 642), says: "No one disputes that for many purposes the architect is the agent of the building owner, and would therefore be liable to an action for negligence, but it is not inconsistent with that proposition that for some purposes he should assume the rôle of a quasi arbitrator. . . . In *Rogers v. James* the architect was apparently not acting in that capacity, but as agent for his employer."

Rogers v. James referred to by Collins, L.J., is to be found in (1891) 8 Times L.R. 67. There the architect had acted negligently in determining the amount due as between the owner and contractor. The Court of Appeal (Lord Esher, M.R., Lopes and Kay, L.JJ.) held that, although the contract provided that his decision should be final as between owner and contractor, it was not final as between owner and architect. The builder had omitted to put certain prescribed concrete into the foundations and to do certain other work; this the architect had failed to observe from his not properly supervising the building, and the owner counterclaimed for damages when sued for the archi-

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tect's commission. The jury found for the owner on the counterclaim, assessing the damages at £90. An appeal was dismissed by the Court of Appeal—"the architect must not act negligently." *Rogers v. James* is not disapproved in *Chambers v. Goldthorpe*, and is clear law.

In *Jameson v. Simon*, 1 F. (Ct. of Sess. Cas., 5th series) 1211, an architect was employed to plan and supervise the building of a house. There was no clerk of the works, and the architect contented himself, as in the present case, with an occasional visit to the works and getting anything set right which he observed wrong on such visits. The builder, whom the architect considered honest and competent, scamped the work; and in an action by an architect for his fees the duties of an architect came up for consideration. At p. 1221 Lord Young says: "To some extent an architect is an artist—that is, as regards the design and plan. But for the rest his work is just ordinary tradesman's work—drawing specifications and supervising the work. He is not supposed to do all the supervising personally. His subordinates can do much of it as well as he can himself, but if he undertakes to do it, he is bound either to do it himself, or to have it done by some person whom he employs and in whom he has confidence. I think the meaning of the contract is that he shall see that the work is done well before he certifies it. If he does not do this then the interest of his employer is altogether neglected. . . . I think the defender was liable for the neglect of the employer's interests which took place."

I adopt this as an accurate statement of our law in a case in which (as in the Scotch case) there is no written contract between the parties and the contract is not on any special terms. It is not necessary to go through the cases mentioned in Hudson and in the third volume of Halsbury. I simply refer to *Leicester Guardians v. Trollope*, 75 J.P. 197, where Channell, J., makes (p. 199) the pertinent inquiry, "Is not the architect employed to see that the work is not scamped?"

The architects failed to perform their elementary duty to exercise a sufficient supervision over the building, and so broke their contract. Damage followed the breach immediately, by the

builders placing defective materials in the building, and so injuring the plaintiffs. For this an action will undoubtedly lie.

The second point is at first blush merely a matter of practice; but the objection goes much deeper. An appellate Court could not be expected to, and we certainly would not, listen the greater part of a day to argument upon a point of practice pure and simple, nor did the appellants urge their appeal in that view.

The learned trial Judge tried the cases together, and at the conclusion, when giving judgment, he said: "If there is no authority for consolidating two actions such as these, it seems to me that it is time that such authority was made; and, so far as I have power to make it, and in addition to the order which I made at the beginning of the case, that the two actions should be tried together, I now order their consolidation."

The formal judgment reads:—

"2. This Court doth order that these two actions be and the same are hereby consolidated.

"3. This Court doth order and adjudge that the plaintiffs do recover against the defendants the sum of \$19,500, subject however to the deduction hereinafter mentioned."

Clause 4 provides for determination of the amount of deduction by the Master, not here in controversy.

"5. And this Court doth further order and adjudge that the defendants do pay to the plaintiffs their costs of these actions, to be taxed as the costs of one action, up to and inclusive of this judgment, forthwith after taxation thereof."

Clause 6 provides for the costs of the reference.

The judgment has the heading in both suits.

The appeal of the architects is really based upon the proposition that the plaintiffs were bound to elect which set of defendants they would sue, and that a judgment against the contractors would bar an action against the architects. The contractors admit that they are liable, and before us complained only of the quantum. This we decided on the argument adversely to the appeal.

There are many cases in which one having a cause of action

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against two or more others is barred of proceedings against one by obtaining judgment against another, even without satisfaction of the judgment. These all depend upon the principle of our law that where a judgment is obtained every cause of action upon which the judgment is based is merged in the judgment and disappears—“*transit in rem judicatam*.” This principle is a survival from an earlier period in the evolution of our law, and it is too firmly established for the Court to question it. The Legislature has neither used the surgical knife itself nor authorised us to use it, to remove this appendix. Whether it is useful or in accordance with justice and reason, every one must decide for himself; that it is law, no one can doubt.

A., acting in reality but not ostensibly for B., enters into a contract with C. When C. discovers the agency, he may sue either A. or B.; but, if he obtains a judgment against A., he cannot thereafter sue B. B. would answer: “There was one and only one contract; you might at your option consider A. or myself a party thereto, and therefore sue either; your judgment against A. has destroyed that contract—*transivit in rem judicatam*. You may indeed have a ‘contract by matter of record.’ but I am not a party to it.”

In the ordinary case nothing short of a judgment operates as a discharge of the party not sued: *Curtis v. Williamson* (1874), L.R. 10 Q.B. 57; *Calder v. Dobell* (1871), L.R. 6 C.P. 486, at p. 499; but, as in all other cases, the plaintiff may estop himself from an action by his conduct: *Smethurst v. Mitchell* (1859), 1 E. & E. 622.

It makes no difference what kind of an agent may be sued: whether a broker, as in *Calder v. Dobell*, L.R. 6 C.P. 486; a freighter, as in the leading case of *Priestly v. Fernie* (1865), 3 H. & C. 977; a wife, as in *Sullivan v. Sullivan*, [1912] 2 I.R. 116; *Morel Brothers & Co. Limited v. Earl of Westmorland*, [1904] A.C. 11; *French v. Howie*, [1905] 2 K.B. 580, [1906] 2 K.B. 674.

There is another class of cases in which the same rule is laid down. Where there are two or more joint debtors or contractors, and an action has been brought and carried to judgment against

one or some only, those not parties to that judgment may plead it in bar of an action against them, even though the judgment is by consent: *McLeod v. Power*, [1898] 2 Ch. 295; *In re Hodgson* (1885), 31 Ch. D. 177, *per* Bowen, L.J.

A. and B. are jointly liable to C. C. brings an action against A. alone and obtains judgment: *transit in rem judicatam*. If B. is sued, he can say, "There is no liability on my part," and "the basis of this defence is not the election or unconscious election, if there can be such a thing, of the plaintiff, but the right of the co-contractor when sued in a second action on the same contract to insist, though not a party to the first action, on the rule that there shall not be more than one judgment on one entire contract:" *per* Vaughan Williams, J., in *Hammond v. Schofield*, [1891] 1 Q.B. 453, at p. 457.

In the case just cited, an action had been taken against one of a firm of two persons, and judgment signed. Then the plaintiffs became aware that another person was a partner, and applied on consent of the defendant to set aside the judgment already signed in order to allow them to sue the person so discovered by adding him as a party to the action. It was held that the Court could not make such an order.

But, if there is not "one and only one" contract, the rule does not apply. If A. and B. are jointly and severally bound to C., and C. sues A. alone to judgment, that does not bar his action against B. The contract of A. to pay is merged and *transit in rem judicatam*, but the separate contract of B. is wholly unaffected. Payment will operate as a bar, but not judgment.

"Where there are joint and several contracts, or joint and several debts, or where the several parties are independently and collaterally bound by the same obligation, the recovery of judgment against one of such separate contractors or separate debtors is no bar to an action against the others, until the judgment has been satisfied:" Addison on Contracts, 11th ed., p. 193. This is as old as Queen Elizabeth's time (*Blumfield's Case* (38 & 39 Eliz.), 5 Co. R. 86 B), and cannot be doubted. See *per* Montague Smith, J., giving the judgment of the Court in *Vestry of Bermondsey v. Ramsey* (1871), L.R. 6 C.P. 247, at p. 251; *per*

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Stirling, J., in *Blyth v. Fladgate*, [1891] 1 Ch. 337, at p. 353. And it makes not the slightest difference that the amount secured by the independent contracts is the same and for the same debt.

In *Drake v. Mitchell* (1803), 3 East 251, one of three joint covenantors gave a bill of exchange for part of the debt, and judgment was obtained thereon. It was held that there was no defence to an action upon the covenant against the three. The bill was not taken for the payment and in discharge of the debt, and the judgment could not be a merger of the covenant.

In *Cambefort v. Chapman* (1887), 19 Q.B.D. 229, a partner gave a bill of exchange for the amount of the partnership debt. Judgment was obtained on the bill, and this was held by a Divisional Court to be a bar to an action for the debt; but this was disapproved by the Court of Appeal in *Wegg Prosser v. Evans*, [1895] 1 Q.B. 108, holding that *Drake v. Mitchell* is good law, and that the principle of *Kendall v. Hamilton* (1879), 4 App. Cas. 504, did not apply.

The general principle will be found thoroughly discussed in the cases mentioned and in *King v. Hoare* (1844), 13 M. & W. 494; *Scarf v. Jardine* (1882), 7 App. Cas. 345.

In the present case, the plaintiffs had two separate and distinct contracts, the one with the contractors, which was in writing, the other with the architects, which was, as in *Jameson v. Simon*, (not in writing but) implied from the employment. The contractors broke their contract when they put bad material into the building; at the same moment the architects broke theirs because they allowed this to be done. Under the circumstances, the damages are the same under either contract; but that is wholly immaterial. The contracts are not the same; and, if judgment were to be obtained in the action against the contractors, it would destroy their contract *quoad hoc*, but it could not affect the contract of the architects—that *non transit in rem judicatam*, but remains a simple contract.

It is true that, if the full amount of the damages were realised out of the contractors, no action (except perhaps for nominal damages) would lie against the architects, but that is on an entirely different principle, namely, that the plaintiffs have suffered no damage from the default of the architects.

The result is, that the plaintiffs are entitled to judgment against both the contractors and the architects, and that is what the judgment in appeal gives them.

Technically, I think, the judgment is wrong in "consolidating" the actions. In strictness, actions can be consolidated only when they are between the same parties, which is not the present case. It is in this sense of the term that our Rule 320 says, "Actions may be consolidated by order of the Court." "Consolidation," "consolidate," are not uncommonly used in a looser sense, indicating the stay of one action until another is tried, and the like; but no case of the kind is made here: *Kuula v. Moose Mountain Limited*, 26 O.L.R. 332.

The plaintiffs might have insisted on a judgment in both cases with costs, either set of defendants to be at liberty to move, in the nature of an *audita querela*, to stay their action on payment of costs if and when the amount was made out of the other set, and either set of defendants to be at liberty to bring an action to recover from the other any sum paid by them, etc. (I do not suggest that any such action will lie on the facts, but the defendants should not be precluded from litigating the question if so advised.) Probably the plaintiffs would consent to this being done now, if the defendants desired it. If all parties agree, that may be done, and the appeal to that extent allowed; but, as the real question is decided against the defendants, they should pay the costs of the appeal.

There is, however, a better course that should be adopted.

Our Rule 67 is very broad: "Where the plaintiff claims that the same transaction or occurrence, or series of transactions or occurrences, give him a cause of action against one or more persons . . . , he may join as defendants all persons against whom he claims any right to relief, whether jointly, severally, or in the alternative; and judgment may be given against one or more of the defendants according to their respective liabilities."

The former Rule, Con. Rule 186, was interpreted rather narrowly owing to the decisions in *Smurthwaite v. Hannay*, [1894] A.C. 494, and similar cases; and considerable trouble was the result, as is seen by such cases as *Crane v. Hunt and Wayper*,

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26 O.R. 641; *Hinds v. Town of Barrie*, 6 O.L.R. 656; *Andrews v. Forsythe*, 7 O.L.R. 188; *Baines v. City of Woodstock* (1905), 10 O.L.R. 694; *Thompson v. London County Council*, [1899] 1 Q.B. 840; *Frankenburg v. Great Horseless Carriage Co.*, [1909] 1 Q.B. 504.

The present Rule was introduced to get over the difficulties and inconveniences found in the old practice by reason of such decisions; and now, if the same series of transactions, etc., gives a cause of action against more than one, they can all be sued in one action, though the causes of action be not the same.

Rule 67(2) gives power to the Court to prevent inconvenience or injustice by such joinder.

The same series of transactions gave a cause of action against the contractors because they broke their contract, and against the architects because they broke theirs. The causes of action were not, it is true, in all respects identical, but that is immaterial under our present Rule. Had then the actions been brought after the coming into force of our present Rule, there would have been no reason why the contractors and architects should not be joined as defendants. That being so, Rule 134 empowers the Court to add either set of defendants as defendants in the other action, and dispose of all matters in this action.

Unless the parties agree on the course previously indicated, we should add the architects as defendants in the first action (or the contractors in the other, as the plaintiffs may prefer), and stay the other action.

The plaintiffs should have their costs of the appeal. The same rights will be reserved to either set of defendants as if the course previously suggested were followed. In other respects the appeal is dismissed.

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Innkeeper—Liability for Luggage of Boarder Lost or Stolen—Status of Innkeeper—Keeper of Boarding-house—Duty to Take Reasonable Care—Undertaking—Bailment—Onus—Evidence—Findings of Jury—Judge's Charge—Credibility of Witnesses—Damages—Finding of Fact by Appellate Court—Judicature Act, R.S.O. 1914, ch. 56, sec. 27—Innkeepers' Act, R.S.O. 1914, ch. 173, secs. 4, 6—Limitation of Liability—Pleading—Exception—Deposit for Safe Custody.

The plaintiff, who had engaged a room at the defendants' hotel for three months, sent her trunk there pursuant to an arrangement with the hotel clerk. When she arrived at the hotel on the following day, the trunk could not be found, and had been apparently lost or stolen. It was never found; and, in an action for the value of the trunk and contents, the jury found that the defendants had received the trunk; they assessed the damages at \$800, for which sum judgment was entered in her favour by the trial Judge:—

Held, that, while the defendants' status and liability in regard to the plaintiff was not that of an innkeeper or hotelkeeper, but rather that of a boarding-house keeper, they were bound to take reasonable care of her trunk.

An innkeeper* or hotelkeeper may also be a boarding-house keeper. Distinction between the liability in the one case and that in the other pointed out.

Review of the authorities.

Dansey v. Richardson (1854), 3 E. & B. 144, *Scarborough v. Cosgrove*, [1905] 2 K.B. 805, *Holder v. Soulby* (1860), 29 L.J.N.S.C.P. 246, 8 C.B.N.S. 254, and *Lamond v. Richard*, [1897] 1 Q.B. 541, specially referred to.

Per MULOCK, C.J.Ex., and CLUTE, J.:—There was an express agreement by the defendants, through their clerk and servant, to take charge of the plaintiff's trunk and place it in her room. The reasonable duty so undertaken was entirely disregarded; the trunk was left in the passage-way unprotected, and was taken away or stolen and lost through the neglect and default of the defendants. The jury were not charged on the question of negligence, but were told that if they found that the trunk came to the premises of the defendants, the defendants were liable. This charge could not be sustained; but it was not necessary to send the case back for a new trial: the principal facts were not contradicted; and the Court had the right, under sec. 27 of the Judicature Act, R.S.O. 1914, ch. 56, sec. 27, to find, and should find as a fact, that the defendants did not take reasonable care of the trunk, and that this neglect amounted to negligence, and rendered them liable to the plaintiff for the loss of her trunk and contents.

Per HODGINS, J.A., and RIDDELL, J.:—The facts of the case made the defendants bailees of the trunk and its contents, and their duty was to take such due and proper care of them as a prudent owner might reasonably be expected to take of his own goods. There was no evidence of any care; and the trial Judge properly charged the jury that the defendants were liable if they received the trunk; it was not necessary for him to tell the jury that the defendants had not proved that the default was not due to their negligence. If the charge was defective, the Court should proceed under sec. 27 of the Judicature Act and find that the defendants, not having met the onus cast on them by law, were liable for the loss of the goods.

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It is always the right and sometimes the duty of a Judge to express his opinion of the credibility of a witness for the assistance of the jury; and, so long as he does not usurp the functions of the jury, but explains to them that they are the judges of fact, he is not trespassing.

Semble, per RIDDELL, J., that to have the benefit of the Innkeepers' Act, R.S.O. 1914, ch. 173, it is not necessary to plead it.

And held, per Curiam, that the defendants were not entitled to the benefit of sec. 4 of the Act, limiting the damages to \$40, because the defendants had not (the onus being upon them) shewn compliance with sec. 6, requiring a copy of sec. 4 to be kept posted in certain places in an inn or hotel; and also because the goods had been deposited expressly for safe custody with the defendants, and so came within the exception in subsec. 2 of sec. 4.

APPEAL by the defendants from the judgment of LENNOX, J., upon the findings of a jury, in favour of the plaintiff, for the recovery of \$800 and costs, in an action brought for the value of a trunk and contents, left at the Arlington Hotel, Toronto, of which the defendants were the proprietors.

October 19th and 20. The appeal was heard by MULOCK, C.J. Ex., HODGINS, J.A., CLUTE and RIDDELL, JJ.

C. M. Garvey, for the appellants, argued that upon the evidence the plaintiff was coming to stay at the hotel as a boarder or lodger, not as a guest. There is a great distinction between the two, and the cases shew that the liability is different: *Lamond v. Richard*, [1897] 1 Q.B. 541, at p. 548; *Jelf & Hurst's Law of Innkeepers*, pp. 62, 63; *Beale on Innkeepers and Hotels*, p. 90, paras. 138, 139. If the plaintiff is found upon the evidence to have been coming to the hotel as a boarder, we are guilty of non-feasance merely, not of misfeasance, and are therefore not liable: *Holder v. Soulby* (1860), 29 L.J.N.S. C.P. 246, 8 C.B.N.S. 254. On the question of what constitutes negligence, see *Whitehouse v. Pickett*, [1908] A.C. 357, at pp. 362, 365. On the question of the right of the Court to grant relief, see *Lowry v. Thompson* (1913), 29 O.L.R. 478, at pp. 488, 489; *Weiser v. Segar*, [1904] W.N. 93. The onus is on the plaintiff to shew that the trunk was lost by the appellants' negligence, and he has not discharged that onus. In any event, as the plaintiff was not actually a guest at the hotel at the time of the loss of the trunk, the appellants were only in the position of gratuitous bailees.

K. F. Lennox, for the plaintiff, the respondent, argued that, even if the plaintiff were not a guest at the hotel, the defend-

ants were bailees: Halsbury's Laws of England, vol. 1, p. 545, para. 1109. On the question of the plaintiff being a guest at the hotel, see Jelf & Hurst's Law of Innkeepers, p. 14; *Allen v. Smith* (1862), 12 C.B.N.S. 638.

Garvey, in reply, referred briefly to the evidence; and also contended that the defendants were, if liable at all, not liable for more than \$40, under the Innkeepers' Act, R.S.O. 1914, ch. 173.

November 30. CLUTE, J.:—The action is brought for the value of a trunk and contents, belonging to the plaintiff and left at the Arlington Hotel, Toronto, of which the defendants are proprietors.

The plaintiff alleges that in December, 1913, she engaged a room in the Arlington, and had her trunk taken there, in accordance with an arrangement previously made; that after the trunk was delivered at the hotel it was lost or stolen as the result of the negligence of the defendants, their servants or agents. The defendants deny that the trunk ever arrived at the hotel, and also deny negligence.

It was proven by the plaintiff that she engaged the room, number 68, a week before she delivered the trunk, and it was arranged that she should take it on the 22nd. On that day, she called up the hotel by telephone and asked for the clerk with whom she had made the arrangement. He came. She told him she was going to send her trunk that day at two o'clock, and he said, "All right, Mrs. Macdonell, I have kept room 68 for you." This evidence is not contradicted—the clerk with whom she made the arrangement was not called by the defendants. The arrangement was that she was to pay \$7.50 a week or \$30 a month for the room; the midday dinner and other meals were to be charged extra. On the 22nd, she sent the trunk by Hearn, cartage agent. He says that he called at Mrs. Macdonell's at two o'clock and received her trunk from her. He helped her to close the lid, the trunk being so full with clothes. The plaintiff instructed him to take the trunk to the Arlington Hotel, with a slip shewing the number of her room. He went to the Arlington Hotel, "and

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asked the clerk where I should put this trunk for the room number on the slip." He did not shew the clerk the slip, he seemed to know all about it, "and told me to leave it just inside the door on the left hand side, and he would attend to it;" and Hearn left the trunk inside the door, as he was told, and that was the last he saw of it. "Q. He seemed to know it was coming? A. Yes; he said, 'You put it there, we will attend to it.'"

On the following day, the plaintiff went to the hotel, and on reaching her room found the trunk was not there, and, search being made, she was informed it was gone. The trunk has not since been seen or heard of.

A detective was called in, but without result.

In the charge the learned trial Judge told the jury that from the evidence there seemed to be no doubt at all that the trunk came to the hotel and was stolen. "That being so, I must instruct you as a matter of law, if you come to the conclusion that the trunk was delivered there, and the evidence is all the one way regarding that, I must instruct you as a matter of law that the hotel company is liable."

No objection was taken to this charge. At the trial no question seems to have been raised or distinction drawn between the liability of an hotelkeeper where the person seeking damages for a lost article is a transient traveller, that is, the ordinary guest of an inn, and the liability where the person is a permanent boarder.

On the argument counsel for the defendants objected to the charge, and for the first time further urged that the defendants were not responsible as innkeepers, and that their damages are limited under the Innkeepers Act to \$40; and further contended that it was a question of negligence and should have been submitted to the jury, and that the defendants were entitled to a new trial. In the view I take, the question of limited damages does not arise; but, if it did, the defendants could not avail themselves of it, as it did not appear that notice as required by sec. 6 of the Innkeepers' Act, R.S.O. 1914, ch. 173, was duly posted up; and, if it were, they fall within the exception in sec. 4 owing to their default.

There is a distinction between the law as it relates to the duties of an innkeeper and the law as it relates to those of a boarding-house keeper, and a further distinction as to the liability even of an innkeeper where the inmate is a guest or a boarder, as to the measure of responsibility for his goods.

In *Dansey v. Richardson* (1854), 3 E. & B. 144, it was held by the whole Court that a boarding-house keeper is not bound to keep a guest's baggage safely to the same extent as an innkeeper; but that there is an undertaking by implication of law, although nothing is expressed, to take due and proper care of a guest's baggage. Erle, J., and Wightman, J., held that, unless the defendant herself was guilty of negligence, the act of the servant was not one for which the defendant was responsible. Coleridge, J., and Campbell, C.J., held that the act of a servant was, under the circumstances, the act of the defendant.

In *Holder v. Soulbey*, 29 L.J.N.S.C.P. 246, it was held that there is no duty on the part of a lodging-house keeper to take care of his lodger's goods; and, therefore, in the absence of any misfeasance by him, he is not responsible for a loss arising from neglect to take such care of his house as a prudent owner would take, or from the wrongful act of a stranger, to whom, with the license of the lodger, according to the usual practice between landlord and tenant, he had shewn the apartments, after the expiration of the lodger's tenancy. The question arose on a demurrer. Erle, C.J., says: "On the first count the plaintiff claims to be entitled to recover on the mere relationship of lodger in the defendant's house, and it is assumed in that count that the law creates a duty on the part of a landlord to take proper care of the goods of his lodger. Now, when one looks to the authorities to see whether the law creates any such duty, it is clear that no Judge or treatise ever affirmed any such proposition. . . . Now, I am averse to affirming for the first time the proposition, that a lodging-house keeper is bound to take due and proper care of his lodger's goods. . . . The law is, that the lodger must take care of his own goods in lodgings, as he must with respect to valuables about his person when he walks the streets; he may, if he please, leave them in the hands of the owner for

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safe custody, or else he must take care of it himself. I consider *Calye's Case* (1584), 8 Co. Rep. 32a, to be the law upon this point, and it is directly against the plaintiff."

I may also refer to *Hollingsworth v. Nicholson and Co.* (1904), in the addendum to Jelf & Hurst's Law of Innkeepers, and not, I believe, elsewhere reported. The trial Judge, Mr. Justice Bucknill, said: "The cases go to shew that a man who has been a guest does not cease to be such because he stays a long time at the inn, but that an innkeeper may take in a man not as a guest but as a lodger. Even if I am wrong in saying that the house was not an inn, I say there is no evidence that the plaintiff was a guest. I think he was a lodger. In such case, after reading *Dansey v. Richardson* and *Holder v. Soulby*, I think that the defendants are only liable for misfeasance and not for mere negligence."

In *Scarborough v. Cosgrove*, [1905] 2 K.B. 805, *Dansey v. Richardson* is followed and *Holder v. Soulby* commented upon. The plaintiffs there became boarders in a boarding-house kept by the defendant. They asked for a key of a chest of drawers, but none was given. The plaintiffs having left jewellery in a locked handbag in one of the drawers, it was stolen by another inmate of the house, who had been admitted as a boarder without references, or introduction, or inquiry, and who turned out to have been previously convicted of theft. In an action for the loss of the jewellery, it was held by Collins, M.R., and Mathew, L.J., that it was the duty of the boarding-house keeper to take reasonable care for the safety of property brought by a guest into his house, and held by Romer, L.J., that there was a duty on the part of a boarding-house keeper to carry on his business with reasonable care. At the trial, Darling, J., withdrew the case from the jury, holding that to found liability in a boarding-house keeper "there must be something more than negligence, there must be something which the law calls misfeasance, and that negligence in this case was not enough." He, therefore, gave judgment for the defendant. Collins, M.R., in reference to the view taken by Darling, J., said: "In doing so, he acted on the authority of *Holder v. Soulby*. The questions, therefore, are,

Was the defendant exempt from liability for negligence short of misfeasance? If not, was there evidence of such negligence fit for the consideration of the jury? I think the case cited does go the full length of the proposition laid down by the learned Judge; but before examining it I desire to refer to the earlier case decided in the Court of Queen's Bench which seems to me to be in conflict with it, and which I think must be admitted to be of at least equal authority: *Dansey v. Richardson*. There the action was brought by a guest at a boarding-house for the loss of a dressing-case stolen while the plaintiff was a guest. There was evidence that the theft was facilitated by the defendant's servant having left the street door ajar. Erle, J., who tried the case, in substance directed that a boarding-house keeper 'was bound to exercise due and reasonable care as to the guest's property to the same extent which a prudent person would take of her own;' but he told the jury that it would not be enough to fix the defendant, if they thought the servant was negligent, unless they thought the defendant was aware of anything which made it negligent in her to keep that servant. On a rule to shew cause, the Court, Lord Campbell, C.J., and Coleridge, Wightman, and Erle, JJ., were, according to the head-note, agreed that a boarding-house keeper 'undertakes by implication of law, although nothing is expressed, to take due and proper care of a guest's baggage,' . . . It is true that in the subsequent case of *Holder v. Soulby*, Erle, C.J., who had directed the jury as above stated, said that he 'did not intend to say that a lodging-house keeper was bound to take such care of his lodger's goods as a prudent owner would take of his own property.' But, even with this qualification, the first proposition affirmed in *Dansey v. Richardson* has the authority of three Judges at all events. *Holder v. Soulby* was decided on demurrer, and related to a lodging-house only, though I confess this does not seem to me to make any difference in principle." He then refers to the statement of Erle, C.J., namely: "Now, it is clear that no case or treatise or Judge has ever affirmed that proposition;" and continues: "This is strange, as, six years before, Lord Campbell, C.J., in *Dansey v. Richardson* had said: 'I think that the application for a nonsuit was properly refused and that the defendant

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was not entitled to a verdict on the fourth plea denying that the plaintiff was received into the boarding-house with her goods on the terms mentioned in the declaration'—*i.e.*, to take due and reasonable care of the plaintiff's goods whilst they were in the house and whilst the plaintiff was such guest for hire and reward to the defendant. . . . 'The defendant did receive the plaintiff with her goods on the terms . . . of taking due and reasonable care of her goods while they were in the said house and plaintiff remained such guest therein.' Coleridge, J., says: 'Unless it can be established that the defendant was not bound to take any care, it must be admitted she was bound to take due and reasonable care. It seems to me perfectly clear that she was bound to take some care, and that my brother Erle was quite right in refusing to nonsuit.' " After some further reference to both cases, Collins, M.R., proceeds (p. 812): "To my mind, the reasoning of Coleridge, J., and Lord Campbell, C.J., seems conclusive on the whole question, both as to the existence of the duty and the incidental responsibility of the master for the negligence of the servant delegated by the master for the performance of some part of that duty." Romer, L.J., after stating that *Dansey v. Richardson* and *Holder v. Soulbby* have not left the law concerning the liability of a boarding-house keeper to a paying guest in respect of the latter's luggage in a perfectly settled or satisfactory state, proceeds to give his opinion (p. 814): "The difficulty as to the law arises in cases like the present, which are intermediate between the two I have just mentioned, and where the luggage cannot be said to be in the sole custody of either the landlord or the guest. In the present case the luggage was placed in a room which was appropriated as a bedroom for the sole use of the guest, but the guest had not the sole control of the room. . . . Now I think that it cannot be said that the landlord is under an absolute duty to take reasonable care of the luggage if by the word 'care' it is implied that the landlord is in the same position as if the care and custody of the luggage had been committed solely to him. That, in my opinion, cannot be implied, without further knowledge of the facts, merely from the position of a boarding-house keeper towards his paying guest; and I think this was the view taken

by Erle, C.J., in the cases of *Dansey v. Richardson* and *Holder v. Soulbby*, and accounts for many of the observations in his judgments. On the other hand, it appears to me not correct to say that in such a case there is not some duty by the landlord to his guest which may affect the question as to liability for loss of the luggage. Seeing that the landlord carries on his business of a boarding-house keeper for reward, I think he is bound to carry on that business with reasonable care, having regard to the nature and normal conduct of the business as known to the guest, or as represented to the guest by him; and if by reason of a breach of that duty on his part the luggage is lost I can see no reason why he should not be held liable for the loss to the guest."

An innkeeper is responsible to his guests for goods lost or stolen within the inn—in short, he is insurer except where such liability is limited by statute. But this liability is confined to innkeepers properly so called, and does not extend to a lodging-house keeper or boarding-house keeper.

In *Newcombe v. Anderson* (1886), 11 O.R. 665, Wilson, C.J., and Armour, J., point out that at common law a boarding-house keeper has no lien, but that now by statute he has a lien upon the goods of a boarder or lodger, and is bound to take such care of them as a prudent person will take of his own goods.

In the present case, I think it clear from the evidence that the capacity in which the plaintiff entered the Arlington was not that of an ordinary traveller or transient guest, but as a boarder under a contract for board by the week, with the intention of staying a considerable time. I take the law to be as laid down by Coleridge, J., and Campbell, C.J., in *Dansey v. Richardson*, and followed in *Scarborough v. Cosgrove*, and that there was a duty on the part of the boarding-house keeper to take reasonable care for the safety of the property brought by the guest to the hotel; and, further, that in this case there was evidence of an express agreement by the defendants, through their clerk and servant, to take charge of the plaintiff's trunk and place the same in her room, and that it was a question of fact as to whether or not the defendants were guilty of neglect and want of reasonable care in this regard.

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The jury were not charged on the question of negligence, but were told that if they found that the trunk came to the premises of the defendants, the defendants were liable. I do not think this charge can be sustained, and under the former practice the case should, in my opinion, go back for a new trial. But, under the Judicature Act, R.S.O. 1914, ch. 56, sec. 27, this is unnecessary. The principal facts are not contradicted. There can be no doubt whatever upon the evidence that an arrangement was made by the plaintiff with the defendants' clerk that the trunk should be sent to the hotel, and that on the day when it was sent the clerk was notified and promised to receive it and send it to her room. This reasonable duty so undertaken was entirely disregarded: the trunk was left in the passageway unprotected, and was taken away or stolen and lost through the neglect and default of the defendants.

I think that this is a case where the Court has the right, under sec. 27 of the Judicature Act, to find, and should find as a fact, that the defendants did not take reasonable care of the trunk, and that this neglect amounted to negligence upon their part and rendered them liable to the plaintiff for the loss of her trunk and contents.

The appeal should be dismissed with costs.

MULOCK, C.J.Ex.:—I agree.

RIDDELL, J.:—The plaintiff sued the defendants, alleging in her statement of claim: (1) that the defendants were the proprietors of the Arlington Hotel; (2) that she engaged a room in that hotel, and had her trunk taken there, in accordance with an arrangement; (3) that the trunk was delivered at the hotel, but was lost as a result of the negligence of the defendants; and (4) that she has suffered damage. She claimed \$1,000 and her costs.

The defendants (1) denied all the allegations and put the plaintiff to strict proof; (2) said that the trunk never arrived at the hotel, and (3) that they "at no time were guilty of negligence;" and they asked a dismissal of the action.

The plaintiff joined issue simply.

I have been thus explicit in setting out the pleadings, because a great deal was said on the appeal as to the position of the defendants as innkeepers or otherwise. It will be seen that there is no allegation that they were keepers of a common inn, and no claim is made against them based upon their status as such. If the allegation that they were the proprietors of the Arlington Hotel is not merely introductory and descriptive, and some claim is based upon that status, the status is put in issue by the defendants.

The case came down for trial at the Toronto Assizes before Mr. Justice Lennox and a jury. Judgment was given for the plaintiff for \$800; and the defendants now appeal.

Upon the trial the charge was such that the jury had only two questions to consider, viz.: was the trunk received by the defendants? and what are the damages? The defendants' chief complaint is, that other matters should have been passed on by the jury. That will, in my view, depend on the facts.

The plaintiff when in Buffalo had made up her mind to go to the Arlington for the winter, three months, and went to the hotel, saw the manager, and was by him told that she must make arrangements with the clerk. The clerk sent her with a bell-boy up to a room which suited her, and she made arrangements to pay \$30 a month for the room, and decided to take possession on the 22nd. On the 22nd, she telephoned the clerk that she was going to send her trunk that day at two o'clock, and he answered, "All right, Mrs. Macdonell, I kept 68 for you." She gave her trunk, with the number of her room, to a carter, who took the trunk to the hotel, asked the clerk where he should put this trunk for such and such a number; the clerk "seemed to know all about it," and told the carter to leave it just inside the door in the vestibule on the left hand, and that he would attend to it; the carter did so.

The next day, on the plaintiff arriving at the hotel and going to her room, she asked the bell-boy for her trunk. He went away and returned after a time, saying that the trunk came, but had been taken away again; the clerk said a clerk was away in the station looking for it. The clerk afterwards said it had come,

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but had been taken away; that he had gone to the station with the manager of some opera company to see about it, but it was not at the station. It never was forthcoming. The defendant Woods, the manager, says he never saw the trunk, and could not find any evidence that it had been at his hotel, but that he sent a clerk to Hamilton after a theatrical company to see if they had it.

Darnley, the day-clerk, though he was not there the day the trunk is said to have been delivered, swears that no trunk was delivered—he does, indeed, modify this. No other employee was called; no evidence was given of any care or supervision of the trunk; it was obvious that the trunk had not been placed in the plaintiff's room, as it should have been, and as it would have been had the defendants done their duty. (It is more than probable that the negligence was due to the fact of the absence on that day from illness of the regular day-clerk, but that is no excuse for the defendants.)

In that state of the record and of the evidence, the learned Judge charged as follows: "I must instruct you as a matter of law, if you come to the conclusion that the trunk was delivered there, and the evidence is all the one way regarding that, I must instruct you as a matter of law that the hotel company is liable." Complaint is made of this by the defendants, who say that they are not innkeepers *quoad* the plaintiff, and that they are not liable to her as though she was a guest of theirs as innkeepers.

In this contention I wholly agree. The innkeeper is one of the very few, in the legal evolution from status to contract, whose duties are still determined by his status: but these duties are limited. By a decision in Queen Elizabeth's time, *Calye's Case*, 8 Co. Rep. 32a, it was laid down that an innkeeper is liable *quâ* innkeeper only when he keeps a common inn and the guest is a wayfaring traveller using the inn as a wayfarer. See *per* Erle, J., in *Holder v. Soulbby*, 8 C.B.N.S. 254, at p. 264. The first essential is that the defendant should keep a common inn.

I have pointed out that this is not pleaded by the plaintiff; if it is, it is put in issue by the defendants. There is not a word of evidence that the Arlington Hotel is a common inn or

anything but a boarding-house. I am not sticking in the bark and distinguishing an inn from a hotel. A hotelkeeper may perhaps have the same status and duties as a common innkeeper (as is suggested but not decided in *Jones v. Osborn* (1785), 2 Chit. 484), but it must be alleged and proved that he was "the keeper of a common and public hotel."

Secondly, the plaintiff must prove that she is really a guest of a public inn, and not a mere boarder or lodger. As is said by Chitty, L.J., in *Lamond v. Richard*, [1897] 1 Q.B. 541, at p. 548: "The custom of England does not extend to persons who are in an inn as lodgers or boarders;" and he points out that the question to be decided in that case was, "when the character of traveller ceases and that of lodger or boarder begins." The whole case and the authorities cited are well worth reading.

Allen v. Smith, 12 C.B.N.S. 638, was relied upon by the plaintiff. There a man went as a guest to an inn with his horse on his way to a meet of the hounds; he stayed a short time and went away, but returned the same evening and slept at the inn. The next morning a groom in his employ came with another horse, and they stayed there for seven months, with occasional intervals of absence when they went with the horses to races in various parts of the country. The Court held that, as the men came as "*transeuntes*," travellers, in the first place, the contract then entered into must be considered as continuing till a new one was proved. This decision was affirmed in Cam. Seace. (1863), 9 Jur. N.S. 1284, 1285. That a new contract may be implied by lapse of time and other circumstances is shewn by *Lamond v. Richard*, *ut supra*.

But this is quite different from the case of one going, as the plaintiff did, and taking up permanent or quasi-permanent quarters intending to remain there not *transeuns* but for the winter. A fair test to apply is, whether the defendants could legally have refused to take the plaintiff in for the time desiderated. It would scarcely be contended that they could not refuse; and, if they could, she is not a wayfarer "*transeuns*."

The case at the trial was not conducted to prove or to disprove that status of the defendants. Aside from damages, the

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main question was the receipt of the trunk. That was properly left to the jury, and they have satisfactorily passed on it.

On this evidence, if they believed it, the defendants were bailees of the trunk and its contents, with the "duty to take such due and proper care of them as a prudent owner might reasonably be expected to take of his own goods:" *per* Erle, C.J., in *Holder v. Soulby*, 8 C.B.N.S. at p. 265. If, on the assumption that they did receive the trunk, a jury must on the evidence find that they did not do their duty, there was nothing to be left to the jury on that point, and the Judge was perfectly right. We must remember that a Judge in charging a jury is not troubling himself and need not trouble the jury with the general law; it is the law as applicable to the particular facts in the particular case upon which he should charge them.

The facts of this case make the defendants bailees of the trunk and its contents. The duty of a bailee in respect of goods entrusted to him is not doubtful. The latest case in our Courts is *Polson Iron Works v. Laurie* (1911), 3 O.W.N. 213, 20 O.W.R. 314. At p. 316 it is said: "There can be no doubt as to the law; the Polsons having the custody of the boat are bound to use reasonable care for its safety and to prove that they have used such care."

In *Pratt v. Waddington* (1911), 23 O.L.R. 178, the English and Ontario cases are considered, and the law laid down that it is for the bailee to excuse his default in not delivering up the article bailed, and, if he fails to give evidence excusing the default, he must be held liable.

"Where goods are given into the sole custody of a person and accepted by him as bailee, and they are lost while in his custody, the onus lies upon him to shew circumstances negating negligence on his part." *Phipps v. New Claridge's Hotel Limited* (1905), 22 Times L.R. 49, where this principle is laid down, is very close to the present in the facts. A dog had been placed in the custody of the defendants at their hotel, but (as found) "as an ordinary bailment" (p. 50); and the Court held that the onus rested on them to disprove negligence.

In the present case there is not one word as to the care ac-

tually taken of the trunk. There is some evidence of search and inquiry made after it disappeared, but none of anything which took place before the plaintiff asked for her property.

No question arises as to the care to be exercised or whether the defendants were mere gratuitous bailees, as in *Carlisle v. Grand Trunk R.W. Co.* (1912), 25 O.L.R. 372. There is absolutely no evidence of any care.

Such being the facts, the trial Judge must necessarily rule that the defendants were liable for the value of the trunk if they received it, and it was wholly unnecessary for him to tell the jury his reason for so ruling. He might, had he been so minded, have charged the jury thus: "Where a person receives the goods of another in circumstances such as appear in this case, the law casts upon him the duty of either returning the goods on demand or of proving that his default is not due to his own negligence. The defendants have done neither; therefore, if you come to the conclusion that the trunk was delivered there, I must instruct you as a matter of law that the hotel company is liable." Such a course would be wholly unexceptionable. But why waste so many words on what is wholly immaterial?

Even if the charge was defective (and I do not think it is), we should proceed under the Judicature Act and find—what on this record we must find—that the defendants, not having met the onus cast on them by law, are liable for the loss of the goods: R.S.O. 1914, ch. 56, sec. 27 (2).

As to the quantum, there are two objections. First, it is said that the learned trial Judge discredited one of the witnesses. That is not quite accurate: he spoke of the particular witness as apparently respectable, but said that "some of us are less disposed to pin their faith" on evidence of persons of the class to which the witness belonged than to some other people; but he adds at once, "You are the judges of the fact;" and in no way charged them to believe or disbelieve anybody. In our practice it has been said more than once that it is always the right and sometimes the duty of a Judge to express his opinion of the credibility of a witness for the assistance of the jury; and, so long as he does not usurp the function of the jury, but explains to

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them that they are the judges of fact, he is not trespassing. Of course an unfair and intemperate charge may reasonably be complained of, and a new trial granted to a litigant injured thereby. *Campbell v. Prince* (1880), 5 A.R. 330, is a well-known instance.

The Innkeepers' Act, R.S.O. 1914, ch. 173, is not pleaded, and was not referred to at the trial or before us on the opening argument of counsel for the defendants; but, upon its being mentioned by a member of the Court, counsel contended that the defendants were in any event not liable for more than \$40.

I do not think it necessary to decide whether, to take advantage of that Act, a defendant must plead it. The inclination of my opinion is that it is not necessary. I assume that, if it applies, the defendants here can avail themselves of its provisions.

But there are several answers to the contention. In the first place, the innkeeper is entitled to the benefit of sec. 4 only if and while a copy of that section is kept conspicuously posted in the office and public rooms and in every bedroom: sec. 6. This statute is in derogation of the common law; it must be interpreted strictly; and the onus is upon the defendant who claims protection to prove compliance with the statute. See cases quoted in 22 Cyc. 1086; 16 Am. & Eng. Encyc. of Law, 2nd ed., pp. 542, 543. These defendants do not prove anything of the sort.

Again, sec. 4 itself, by sub-sec. 2, excepts goods which "have been deposited expressly for safe custody with the innkeeper." In *Whitehouse v. Pickett*, [1908] A.C. 357, that language was interpreted to mean that "an intention of the bailor was not enough. That intention must be brought to the mind of the bailee or his agent in some reasonable and intelligible manner, so that he may, if so minded, insist on the precautions specified by the Act:" p. 361, *per* Lord Loreburn, L.C.

Here the plaintiff told the clerk that she was sending down her trunk. He said, "All right, Mrs. Macdonell, I kept 68 for you." The carter asked the clerk where he should put the trunk, and the clerk said to leave it just inside the door and he would attend to it. It seems to me that all the requisites are necessary to bring this under sec. 4 (2).

It may be that the difference in terminology in secs. 3 and 4, along with the definition of "innkeeper" in sec. 2, would be another bar in the defendants' way; but I do not pursue that inquiry.

I think the appeal should be dismissed with costs.

HODGINS, J.A.:—I agree.

Appeal dismissed with costs.

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[APPELLATE DIVISION.]

DUFFIELD V. MUTUAL LIFE INSURANCE CO. OF NEW YORK.

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Life Insurance—Presumption of Death of Assured—Seven Years' Absence Unheard of—Limitation of Time for Bringing Action—Terms of Policy—Insurance Act, R.S.O. 1914, ch. 183, sec. 165—Application and Meaning of—Computation of Time—Hearsay Evidence—Admissibility.

In an action, begun on the 16th July, 1913, upon a paid-up policy of insurance on the life of D., who had disappeared and had not been seen or heard of by any of his relatives since 1903, the defendants contended that, if on the facts shewn D. was to be presumed to be dead, that presumption arose at the expiry of seven years from his disappearance, and the action was brought too late, as it was begun more than one year and six months from the end of the seven years: sec. 165 of the Insurance Act, R.S.O. 1914, ch. 183. At the trial a witness deposed that he knew D. intimately, and in 1905 was told by the conductor of a train that within probably six months or a year he had met D.:—

Held, by MIDDLETON, J., at the trial, that the provisions of sec. 165 afforded no answer to the action: the policy was a contract to pay, and it contained no conditions or limitations as to the time to sue; sec. 165 gives a time to sue, notwithstanding any agreement or stipulation limiting the time to be found in the contract; it does not itself purport to limit the time within which an action may be brought; but, in case of the assured, it gives the time there stipulated, notwithstanding the provisions of the contract.

The judgment of MIDDLETON, J., in favour of the plaintiff, for the recovery of the amount of the insurance, was affirmed by a Divisional Court of the Appellate Division.

Held, by MULOCK, C.J.Ex., and SUTHERLAND, J., approving and following *Jackson ex dem. Miner v. Boneham* (1818), 15 Johns. (N.Y.) 226. and *Scott v. Ratcliffe* (1831), 5 Peters 80, 85, that the evidence of the witness above referred to was admissible; that it established a starting-point from which to compute the period of seven years within which D. had not been heard from; that on the expiry of that period the plaintiff became entitled to the insurance money; that it was for the defendants to shew that the period expired more than one year and six months before the 16th July, 1913, according to sub-sec. 2 of sec. 165; and that they had failed to do.

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Per CLUTE, J., that the seven years which raise the presumption of death are the seven years preceding the commencement of the action; sec. 165 was meant to apply to cases where restrictions as to time in the contract of insurance might be unreasonable, and in furtherance of the assured's right to recover; and here, where there was an absolute promise to pay, and it was expressly provided that "payment of the sum insured by this policy shall not be disputed," the statute had no application.

Per RIDDELL, J., that in an action for a declaration that a person may be presumed to be dead, the Court in presuming the death does so on the ground that the person has not been heard of within seven years before the date of the writ of summons by which that action is commenced; the test is, not that he has not been heard of for seven years after some date in the past, but for seven years before the teste of the writ: the sole presumption in this case was, that D. was dead at the date of the writ; if it was of importance to the defendants to establish the date of his death, they were called on to give evidence, which they failed to do; and, if sub-sec. 2 of sec. 165 was applicable to this action, in which the real object to be attained was the payment of the policy, and the declaration of presumption was asked merely as ancillary, the term of seven years began just seven years before the teste of the writ, and the action was in time, being brought exactly at the expiration of the seven years.

AN action upon a policy of life insurance.

June 18. The action was tried by MIDDLETON, J., without a jury, at Toronto.

J. E. Jones, for the plaintiff.

F. Arnoldi, K.C., for the defendants.

June 26. MIDDLETON, J.:—By a policy of insurance bearing date the 20th May, 1901, the defendant company promised to pay \$2,500 upon the death of George M. Duffield. By a supplementary memorandum this money was made payable to Mary J. Duffield, mother of the insured. This policy is a paid-up policy, issued upon the surrender of a former policy for a larger amount.

The insured unfortunately was a man of bad habits, addicted to excessive drinking. He was married, and was living separate from his wife. At that time he was living with his brother-in-law, Mr. Heath. It was difficult for him to find occupation, owing to his physical unfitness resulting from dissipation. The last seen of him was when Mr. Heath met him in Toronto in 1903. He was then in very bad condition, and it was stated that he was employed upon an orchestra in connection with some theatre in Buffalo. Apparently Duffield was throughout on the best of terms with his own family, though his conduct had en-

tirely estranged his wife. He, however, was not in the habit of communicating, at any rate with regularity, with any of them; and after this chance interview in 1903 no trace of him can be found. He was heard of in 1905, but the information then received was in connection with his movements some two years previously; so that it may safely be said that he finally disappeared in 1903 or 1904. Every reasonable inquiry has been made, and I think the proper inference from the evidence is, that he must be presumed to be dead.

The defendants have throughout taken the position that Duffield has not been shewn to be dead. They now take the alternative position that, if on the facts shewn Duffield is to be presumed to be dead, that presumption arose at the expiry of seven years from his disappearance, that is, in 1910 or 1911, and that this action, brought on the 16th July, 1913, is too late, as it is more than one year and six months from the end of the seven years.

There is not in this case any shadow of doubt as to the *bona fides* of the claimants. Throughout, there has been a real and earnest desire to ascertain the fate of the insured. There is no room for suspicion or for the feeling that there has been any attempt on the part of those claiming to avoid obtaining information so as to allow the presumption of death to arise. The defendants from the beginning knew of the situation, and all possible information was given to them, and they made their own inquiries, all resulting in confirmation of what was said by Duffield's relatives. Negotiations were on foot looking to the payment of the money, upon a bond being given to indemnify the defendants against any possible claim that might turn up by reason of any change of beneficiary. This was an entirely imaginary danger, as the policy was payable to a preferred beneficiary, and all those within the class were concurring in the payment, except perhaps the wife, from whom Duffield was separated; and she would, no doubt, have joined if the suggestion had been made. Without any reason that has been disclosed, the defendants suddenly changed their attitude and refused payment; and this action at once followed.

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I have come to the conclusion that the provisions of the Insurance Act now found as sec. 165* of ch. 183 of R.S.O. 1914 do not afford an answer to this action. The policy is a contract to pay, and it contains no conditions or limitations as to the time to sue. Section 165 gives a time to sue, notwithstanding any agreement or stipulation limiting the time to be found in the contract. It does not itself purport to limit the time within which an action may be brought; but, in ease of the assured, it gives the time there stipulated, notwithstanding any provisions of the contract.

I am glad to find a way to defeat what appears to me an unconscionable defence, and one which ought not to have been urged by the defendants in this case. Statutes of limitation are

*165.—(1) Subject to the provisions of section 89 and of sub-sections 2 to 9, notwithstanding any agreement, condition or stipulation to the contrary, any action or proceeding against the insurer for the recovery of any claim under the contract of insurance may be commenced at any time within one year next after the cause of action arose and not afterwards.

(2) Where death is presumed from the person on whose life the insurance is effected not having been heard of for seven years any action or proceeding may be commenced within one year and six months from the expiration of such period of seven years, but not afterwards.

(3) Where the death of the person on whose life the insurance is effected is unknown to the person entitled to claim under the contract an action or proceeding may be brought within one year and six months after the death becomes known to him but not afterwards, but where the death is presumed as mentioned in sub-section 2 this sub-section shall not entitle the claimant to bring an action or proceeding after the time mentioned in that sub-section.

(4) Where an action or proceeding brought within the prescribed period fails because of its having been prematurely brought, and on that ground only, the plaintiff shall be entitled to bring a new action or proceeding at any time within the prescribed period or within six months after the final determination of the first action or proceeding.

(5) Where a claim is made against an insurer on the ground that the person on whose life the insurance is effected is presumed to be dead by reason of his not having been heard of for seven years, and his death is the sole issue between the parties other than disputes as to the persons entitled, such insurer may, before or after action brought, upon at least ten clear days' notice served on the claimant or his solicitor, apply to a Judge of the Supreme Court in Chambers for a declaration as to the presumption of the death.

(6) If the Judge is satisfied that a presumption of death has been established he shall so find and his finding shall, subject to appeal, be binding and conclusive upon all parties interested as establishing the presumption of death, and he may make such order as to the payment of the insurance money as he may deem just.

(7) The payment by the insurer as so ordered shall discharge him from all liability under the contract of insurance.

(8) Where the Judge declares that the presumption of death has not been established he may make such other order as he may deem just.

(9) Unless otherwise ordered by the Judge the application shall operate as a stay of any pending action based upon such presumption.

generally regarded as a means of protecting the defendant against a stale or unjust claim. To allow the statute to be used to defeat a claim arising upon a policy which has for years been paid-up, where there is no shadow of doubt as to the justness of the claim, and where the time limited is supposed to have gone by during negotiations looking to a friendly adjustment of the whole matter, would be a thing so unjust and unreasonable as to shock the conscience of any right-thinking man.

There will, therefore, be judgment for the plaintiff for recovery of the amount, with interest from the date of the writ, and costs. If the defendants desire the protection afforded by sec. 165, sub-secs. 5 to 9, I am ready to make an order under that statute upon the evidence already taken.

The defendants appealed from the judgment of MIDDLETON, J.

October 6. The appeal was heard by MULOCK, C.J.Ex., CLUTE, RIDDELL, and SUTHERLAND, JJ.

F. Arnoldi, K.C., for the appellants, argued that the claim was barred by virtue of the provisions of the Insurance Act, R.S.O. 1914, ch. 183, sec. 165. The deceased was last seen in August, 1903; and, assuming that the presumption of death arose seven years from that time, the action was brought too late on the 16th July, 1913, as that is more than one year and six months from the expiration of the period of seven years. There was no negotiation looking towards a settlement which could have the effect of estopping the defendants from defending the claim; and the effect of the judgment of the learned trial Judge is to override the plain words of an Act of Parliament.

J. E. Jones, for the plaintiff, the respondent, argued that the defendants were taking two positions that were inconsistent with each other, and relied on *Coulter v. Equity Fire Insurance Co.* (1904), 7 O.L.R. 180. He referred also to *Somerville v. Aetna Life Insurance Co. of Hartford* (1910), 21 O.L.R. 276, and contended that the action of the defendants with regard to the proposed settlement constituted an estoppel against their position.

Arnoldi, in reply, argued that the plaintiff could only come

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into Court by virtue of the expiry of the seven year period (subsec. 2 of sec. 165), and that it was not a question of estoppel at all. The defendants have an action brought against them that is barred by the statute.

November 30. MULOCK, C.J.Ex.:—This is an appeal from the judgment of Middleton, J.

The action was begun on the 16th July, 1913, by Mary Jane Duffield, the mother of James M. Duffield, to recover the sum of \$2,500, the amount of an insurance policy, dated the 20th May, 1901, on the life of the said James M. Duffield, payable to her on his death. Duffield disappeared, and had not been heard of for at least seven years prior to the commencement of this action; and, in consequence, the plaintiff claims that his death is to be presumed.

The defence is, that the claim is barred by the Statute of Limitations, and the defendants plead sub-sec. 2 of sec. 165 of ch. 183, R.S.O. 1914: "Where death is presumed from the person on whose life the insurance is effected not having been heard of for seven years any action or proceeding may be commenced within one year and six months from the expiration of such period of seven years, but not afterwards."

The insured, who had lived in the city of London, deserted his wife, Emily Duffield, in the year 1899, since which time she has not seen him. Duffield was of intemperate habits, and gave up business in London in the year 1900, becoming a wanderer, staying for a while at different places, namely, Hamilton, Buffalo, Toronto, Detroit, and elsewhere. He was very musical and fond of theatricals and associated with theatrical people.

His brother-in-law, Frederick Henry Heath, had met him in August, 1903, in Toronto, when Duffield stated that he was then residing in Buffalo. Dr. J. R. McDonald knew Duffield intimately, and in 1905, when coming by train from Chicago, was told at Sarnia by the conductor that within probably six months or a year he had met Duffield at Buffalo; that he was then living in Buffalo and playing the piano at a sporting house; that he had not reformed, but was drinking as heavily as ever. These statements were admitted without objection, and, if they are evidence, they shew that Duffield was alive in 1905.

In *Jackson ex dem. Miner v. Boneham* (1818), 15 Johns. (N.Y.) 226, the question was whether Miner was dead. A witness swore that she heard in 1776 that he was with the New York troops, but never heard of him again until fourteen years after the war, when she was told that he had been killed, and it was held that this evidence was admissible for the purpose of shewing his death.

In *Scott v. Ratcliffe* (1831), 5 Peters 80, 85, the question was when James Madison died. Mrs. Eppes, a witness, swore that she was acquainted with James Madison; that she resided in Petersburg, and that James Madison resided in Williamsburg, Virginia; that in the year 1811 she was in Williamsburg, and was told that Mr. Madison was dead. The trial Judge excluded this evidence, and an appeal was had to the Supreme Court of the United States, and Marshall, C.J., delivered the judgment of the Court, which held that Mrs. Eppes' evidence was admissible to prove the death of James Madison.

Following these cases, I think the evidence of Dr. McDonald was admissible, and establishes a starting-point from which to compute the period of seven years within which Duffield may not have been heard from. On the expiry of that period, the plaintiff became entitled to the insurance money; and the defendants, who plead the Statute of Limitations as a bar to the action, must shew that the death occurred more than one year and six months before writ issued, namely, before the 16th July, 1913.

In 1905, the conductor fixed the time when he had seen Duffield as being probably six or twelve months before his conversation with Dr. McDonald. Consistently with this evidence, the conversation may have taken place at about the close of 1905. If so, Duffield was alive either six or twelve months prior thereto. It was for the defendants to establish affirmatively that, reckoning the seven years from the time in 1905 when the conductor saw Duffield, the expiration of that period was at least one year and six months prior to the commencement of the action. This they have not done; and, therefore, their defence fails, and this appeal should be dismissed with costs.

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CLUTE, J.:—The plaintiff is the mother of one George M. Duffield, and brings this action to recover \$2,500 upon a policy of insurance dated the 20th May, 1901, by which the defendants promise to pay the plaintiff the sum of \$2,500 upon the death of the said Duffield. The assured disappeared shortly after the issue of the policy, and for a period of more than seven years prior to the issue of the writ had not been heard of, and all inquiries and searches for him have proved unavailing.

The trial Judge finds that there has been a real and earnest desire to ascertain the fate of the assured; that there is no room for suspicion or for the feeling that there has been any attempt on the part of those claiming to avoid obtaining information so as to allow the presumption of death to arise; that the defendants from the beginning knew of the situation, and all possible information was given to them; that they made their own inquiries, all resulting in confirmation of what was said by Duffield's relatives; that negotiations were entered into looking to the payment of the money on security being given. This, he finds, was an entirely imaginary danger, as the policy was payable to the preferred beneficiary, and all those within the class were agreeing in the payment, except perhaps the wife, from whom Duffield was separated, and she would, no doubt, have joined if the suggestion had been made. Without any reason that has been disclosed, the defendants suddenly changed their attitude and refused payment, and this action was brought. It appears that Duffield was last heard from in August, 1903. The action was brought in July, 1913. It is claimed that the plaintiff's action is brought too late and is barred by R.S.O. 1914, ch. 183, sec. 165, sub-secs. 1 and 2.

I agree with the trial Judge that the statute affords no answer to the plaintiff's claim.

The policy was given in consideration of the surrender of a former policy, and is fully paid-up, and was made payable to the plaintiff by mutual consent duly endorsed on the policy. A printed endorsement upon the back reads: "It is further promised and agreed that the only conditions which will be binding upon the person whose life is insured under this policy are that the requirements of the company as to age and military or naval

service in time of war shall be observed, and that in all other respects the payment of the sum insured by this policy shall not be disputed."

It is not pretended that there is any question as to age or military service. It is, therefore, an absolute promise to pay. I do not think sec. 165 has any application to a case of this kind. That is a clause enacted with reference to a provision in a policy where the assured is restricted as to the time within which he must bring his action upon a policy, and the sub-clauses are all made with reference to that. Where there is no restriction, it has no application. Section 165(1), subject to the provisions of sec. 89 and sub-secs. 2 to 9, provides that, "notwithstanding any agreement, condition or stipulation to the contrary, any action or proceeding against the insurer for the recovery of any claim under the contract of insurance may be commenced at any time within one year next after the cause of action arose and not afterwards." That is obviously made for the benefit of the assured. Sub-section 2 provides that where death is presumed from the person on whose life the insurance is effected not having been heard of for seven years any action or proceeding may be commenced within one year and six months from the expiration of such period of seven years, but not afterwards. But, assuming the statute to apply, when, then, does the presumption arise? Because it is during the year and six months from the expiration of the seven years that the action may be brought. The subsequent sub-sections shew when the presumption arises. By sub-sec. 5, where a claim is made against an insurer on the ground that the person on whose life the insurance is effected is presumed to be dead by reason of his not having been heard of for seven years, and his death is the sole issue between the parties other than disputes as to the persons entitled, such insurer may, before or after action brought, apply to a Judge of the Supreme Court in Chambers for a declaration as to the presumption of death. The seven years which raise the presumption of death are the seven years preceding the issue of the writ. The statute was made to meet cases where restrictions as to time might be unreasonable, and in furtherance of the insured's right to recover. Here, where there is an absolute promise to pay, and

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where it is expressly provided that the payment of the sum insured under this policy shall not be disputed, the statute has no application.

I would dismiss the appeal with costs.

RIDDELL, J.:—The plaintiff, a widow, brought her action on the 16th July, 1913, against the defendants, an insurance company of standing in New York. She sets out an insurance policy, dated the 20th May, 1901, on the life of George M. Duffield, for \$2,500, payable at his death; that he disappeared, and that “for a period of seven years no news of the said George M. Duffield has been received by the plaintiff (his mother) or by any of those who would naturally hear of him if he were alive, and all inquiries and searches have been made that have been possible;” that on the 2nd April, 1913, the plaintiff submitted proofs of these facts, and asked that payment should be made, “owing to the legal presumption which has arisen that the said George M. Duffield is dead;” that she asked the defendants to apply for a declaration under 2 Geo. V. ch. 33, sec. 165(5), R.S.O. 1914, ch. 183, sec. 165(5), but they refused; and she claims: (1) judgment declaring the presumption that the said George M. Duffield is dead; (2) payment of the amount of the policy; (3) costs; and (4) general relief.

The defendants plead that the policy was to pay to the assured himself, his executors, administrators or assigns, “upon acceptance of satisfactory proofs;” that George M. Duffield had transferred the policy to the plaintiff, her executors, administrators or assigns, from himself, his executors, administrators or assigns; that no proofs of death have been submitted or accepted as satisfactory; George M. Duffield may still be alive, and if the plaintiff contends that his death is to be presumed, she is too late in bringing this action; and they set up 2 Geo. V. ch. 33, sec. 165(2), R.S.O. 1914, ch. 183, sec. 165(2).

The plaintiff died on the 14th September, 1913, and an order to proceed was taken out, reviving the action in the name of her executors.

At the trial before Mr. Justice Middleton at Toronto, on the

18th June, 1914, that learned Judge found that Duffield had not been heard of for seven years, and gave effect to the presumption of death: he also held that R.S.O. 1914, ch. 183, sec. 165(2), did not apply to this case, and gave judgment for the amount of the policy with costs.

From this judgment the defendants appeal, on the ground that the evidence disclosed that Duffield was last seen or heard of in or about August, 1903, nine years and ten months before the beginning of the action, and that consequently the action was barred by sec. 165(2).

The sub-section in question must be examined with care to see precisely what are its provisions; a statute which limits or may limit common law rights of action is always read with great strictness.

What is meant by "such period" in this sub-section? Of course, it is the period of seven years during which the insured has not been heard of, and what period that is will be manifest from a consideration of what it is from which the Court makes the declaration and upon which the Court bases presumption.

When an action is brought for a declaration that one may be presumed to be dead, it is of importance to prove that he has not been heard of within seven years before the teste of the writ. Any evidence concerning a time anterior to this time is *nihil ad rem* except as an inducement to or in explanation of what took place during that period of seven years. And the Court in presuming the death does so upon the ground that the person alleged to be dead has not been heard of within seven years before the teste of the writ, and upon no other ground. For example, suppose that it were proved that the alleged decedent had not been heard of for a period of seven years or seventeen years, if it appeared that he had been heard of within seven years of the teste of the writ, the action would fail. The test, then, is not that he has not been heard of for seven years after some date in the past, but for seven years before the writ.

As it is put in the House of Lords, in *Prudential Assurance Co. v. Edmonds* (1877), 2 App. Cas. 487, at p. 491: "The plaintiff . . . must prove that upon inquiry amongst the relatives

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and friends . . . he had not been able to learn any tidings of him, and that none of the family had heard of him for a space of seven years . . . if none of them had heard or known anything . . . for the space of seven years, the presumption of his death would have arisen." Lord Hatherley, whose words I have just quoted, says at p. 494, in reference to a witness who said he saw the alleged deceased in 1872—the action being brought in 1874—"If the evidence of Mrs. C. was believed, there was clear and distinct evidence that the man was alive within seven years, and there was an end of the case."

And equally, of course, a presumption arising from the fact that the insured had not been heard of within seven years before the teste of the writ would be defeated by evidence that he had been heard of after that day and before trial; but that does not affect the general principle that the teste of the writ is the crucial day.

If, then, an action were brought and the insured presumed by the Court to be dead, the "expiration of such period" would be the teste of the writ; and if, after and upon such presumption, it were sought to recover the insurance money by action, such action must be brought within one year and six months from the teste and not afterwards: R.S.O. 1914, ch. 183, sec. 165(2).

And in like manner, if the insurance company proceed under sec. 165(5) for "a declaration as to the presumption of the death," in strictness the term of seven years being the period immediately before the service of the notice, the action for the insurance money must be brought within a year and six months after that day. The necessity for the beneficiary to take any proceedings is in practice avoided by the Judge making an order for payment; but there is no need for such an order being made; it is wholly discretionary; and many cases can easily be imagined in which such an order would not be made.

In either case, whether the insurance company pursues its statutory method or the beneficiary brings his equitable action, there is no difficulty in applying this sub-section. If it is at all applicable to the present kind of action, in which the real object to be attained is the payment of the policy, and the declaration

of presumption is asked simply as ancillary to the real relief, the term of seven years began just seven years before the teste of the writ, and the writ is in time, being exactly at the expiration of seven years.

If it be contended that the action, in this view, would really be an action based upon the actual death of the insured, the defendants are not advantaged. An appeal to sec. 165(1) would be met by another well-recognised principle.

In a case of presumption of death of a person because he has not been heard of for seven years, the presumption simply is that he is dead, not that he died at any particular time: *Nepean v. Doe dem. Wright* (1837), 2 M. & W. 894. "If it be important to any one to establish the precise time of such person's death, he must do so by evidence of some sort" (S.C., at p. 912); although "the presumption of the fact of death seems . . . to lead to the conclusion that the death took place some considerable time before the expiration of the seven years" (p. 913); *Doe dem. Hagerman v. Strong* (1848), 4 U.C.R. 510, at pp. 523 *sqq.*; S.C. (1851), 8 U.C.R. 291, at pp. 295, 298, 299; *Davie v. Briggs* (1878), 97 U.S. 628.

The sole presumption in the present case is, that Duffield was dead at the date of the writ. If it was of importance to the defendants to establish the date of his death, they were called on to give evidence. This they failed to do.

I think the appeal should be dismissed with costs.

Appeal dismissed with costs.

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RE RUNDLE.

Infant—Guardian of Estate—Trust Company—Encroachment upon Capital for Maintenance and Education—Disallowance—Benefit of Infant—Costs of Action Brought against Company—Loss of Personal Property—Evidence—Guardian of Person—Officer of Trust Company—Improper Appointment—Compensation for Services—Loan and Trust Corporations Act, R.S.O. 1914, ch. 184, sec. 18 (e).

The Court does not sanction the use of the corpus of an infant's estate for maintenance unless satisfied that such use will be more beneficial to the infant than preserving his property intact until he comes of age: there should be no encroachment on the principal except for unavoidable reasons falling little short of necessity.

Goodfellow v. Rannie (1873), 20 Gr. 425, and *Crane v. Craig* (1886), 11 P.R. 236, approved.

An orphan boy became entitled at the age of 19 to his mother's estate, of the value of about \$9,000. A trust company were appointed administrators of the mother's estate and guardians of the boy's estate, one of their officers being appointed guardian of his person. During the two years of his minority the company expended on his behalf for board, education, medical fees, travelling expenses, and paid to him for clothing, pocket-money, and other purposes, sums amounting in the aggregate to \$1,100 more than the income of his estate:—

Held, that the sums paid out of capital, with the exception of \$100, should not be allowed to the company upon the passing of their accounts.

Held, also, that the costs of an action brought by the infant and others against the company, which resulted in relieving the corpus of the estate from payment of a large sum of money improperly disbursed by the company, should be paid by the company.

Held, also, upon the evidence, that the company were not chargeable with the loss of certain personal and household effects said to have formed part of the mother's estate.

Held, also, that it was not competent for the company to be appointed guardians of the person of the infant: Loan and Trust Corporations Act, R.S.O. 1914, ch. 184, sec. 18 (e); the appointment of an officer of the company as guardian was an evasion of the spirit of that Act; and the guardian so appointed was not entitled to any compensation out of the estate for his services.

Order of the Judge of the Surrogate Court of the County of York, varied.

APPEAL by Clarence A. Rundle, Rosa A. Clarke, and W. S. Anderson, from an order of WINCHESTER, Judge of the Surrogate Court of the County of York, made on the passing of the accounts of the Trusts and Guarantee Company as administrators of the estate of Lily Rundle, who died intestate on the 13th November, 1907, allowing certain payments made by the company, out of the estate of the deceased, to or on account of her infant son, the appellant Clarence A. Rundle, who was entitled to the whole of her property as sole next of kin.

October 6 and 7. The appeal was heard by MULOCK, C.J.Ex., CLUTE, RIDDELL, and SUTHERLAND, JJ.

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W. E. Raney, K.C., and *James Hales*, for the appellants, argued that there was no justification for certain payments made by the respondent corporation, and their official, Mr. Warren, to and for the infant Clarence A. Rundle out of the corpus of the estate during his minority, and that the corporation were responsible for the loss of certain assets belonging to the estate. The boy should not have been sent to such an expensive school as St. Andrew's College. This is not a case of a relative who has had a burden thrust upon him, but of a corporation which undertakes the task of administration as a commercial proposition. They referred to *Edwards v. Durgen* (1872), 19 Gr. 101, 104, *per* Mowat, V.-C., which is cited in *Goodfellow v. Rannie* (1873), 20 Gr. 425; *In re Hunter* (1868), 14 Gr. 680; *Simpson on Infants*, 3rd ed., p. 252; *Ashbough v. Ashbough* (1864), 10 Gr. 430; *Crane v. Craig* (1886), 11 P.R. 236, followed by Sutherland, J., in *Re Hollis* (1911), 2 O.W.N. 1447. The respondents have earned no commission, and none should be allowed.

Casey Wood, for the respondent corporation, argued that the expenditures made on behalf of the boy were necessary and reasonable, citing *Edwards v. Durgen*, 19 Gr. at p. 104. The respondents should be relieved from liability by reason of the provisions of 62 Vict. (2) ch. 15, sec. 1: see *In re Lord De Clifford's Estate*, [1900] 2 Ch. 707, 713, *per* Farwell, J.; *Re Nicholls, Hall v. Wildman* (1913), 29 O.L.R. 206, 219, [RIDDELL, J., referred to *Whicher v. National Trust Co.* (1909), 19 O.L.R. 605, 612, reversed in (1910), 22 O.L.R. 460, and restored in *National Trust Co. v. Whicher*, [1912] A.C. 377.] Reference was also made to *Cory v. Gertcken* (1816), 2 Madd. 40; *Stocks v. Wilson*, [1913] 2 K.B. 235.

Raney, in reply.

November 30. The judgment of the Court was delivered by MULOCK, C.J.Ex.:—This is an appeal from the order of Judge Winchester, Surrogate Judge of the County of York, on the

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passing of the accounts of the company, as the administrators of the estate of the late Mrs. Lily Rundle, who died intestate on the 13th November, 1907.

Mrs. Rundle at the time of her death was a widow with one child, Clarence, a boy of 19 years less two weeks. For the two years preceding his mother's death he had been employed at the hardware store of Rice Lewis in Toronto, at a weekly wage of \$3, and he and his mother boarded together, maintaining themselves on his earnings and the income of the mother, derived from her estate, which amounted to about the sum of \$9,000 capital.

Clarence was a lad of somewhat weak nature, but with no bad habits, not studiously inclined, and had not been to school for two years, but his mother had contemplated his taking a course later at a commercial college.

The day after his mother's death, he called on his mother's former solicitor, who took him over to the office of the respondent company, and there introduced him to them, and secured his consent to the company being appointed administrators of his mother's estate. He asked for some money for expenses and to purchase mourning clothes, and was paid \$100 by the solicitor, who was recouped for the amount by the company.

According to the evidence of his aunt, Mrs. Clarke, his wardrobe at this time was that of the average boy in his station in life. At the instance of the solicitor and the company, he then went to his mother's boarding-house and obtained her box containing her securities, which he delivered to the company. Subsequently the company were appointed administrators of Mrs. Rundle's estate and guardians of Clarence's estate, one of their staff, Mr. Warren, being appointed guardian of his person.

In January, 1908, on the advice of Mr. Warren, Clarence became and continued to be a boarding scholar at St. Andrew's College until the end of January, 1909, when he left. He then attended a commercial college for a few days only, then idled until May, then went to Calgary, apparently for the purpose of living on a ranch in the North-West, but in June returned to Toronto, where he got a position with one John D. Luey, with

whom he stayed for two weeks only, then went to Muskoka, and appears to have idled his time thereafter until he attained his majority on the 26th November, 1909.

The gross income of his estate from the time of the company's appointment as administrators until his majority was \$890.68, during which time the company paid out of the principal and interest of his estate the following sums: \$525.95 to St. Andrew's College for board and tuition there; \$75.70 for medical fees; \$238.36 for expenses of his trip to Calgary and return; and \$1,148.70 to Clarence himself for clothing, maintenance, pocket-money, and other purposes.

During the year 1908, when Clarence was a boarder at St. Andrew's College, the company, in addition to paying his board and school fees (and including the \$100 above mentioned), paid \$176 for clothing, and made cash allowances to him, amounting in all to \$361.

Until his mother's death he had been an industrious, steady boy, but in the sudden transition from a life of thrift, where he had to work a week in order to earn \$3, to one of ease, when spending money came for the asking, his character changed. He became a frequenter of a hotel, and acquired drinking, idle, and unsteady habits, which may, I think, be fairly attributable to the excessive amount of spending money which the company continuously paid out to him. I fail to see that his reasonable necessities called for such allowances.

In the following year, which was one of almost continual idleness, the company, in addition to paying his expenses to and from the North-West, paid him for maintenance various sums exceeding \$500. He was then a young man, nearly of age, and not incapacitated for work. He had trouble with one of his wrists, but till his mother's death it had not incapacitated him for work. The company's unwise action in supplying him so freely with money seems to have removed from him all stimulus to industry, and enabled him to stray from the paths of virtue and sobriety. All these expenditures, if allowed to the company, would eneroach on the capital of the estate by more than \$1,100; and the learned Judge deemed it proper to approve of such eneroachment.

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With respect, I am unable to share his view. The Court does not sanction the employment of the corpus of an infant's estate for maintenance unless satisfied that such course is more beneficial to the infant than that of preserving his property intact until he comes of age: *Goodfellow v. Rannie*, 20 Gr. 425.

The rule is stated even more strongly by Boyd, C., in *Crane v. Craig*, 11 P.R. 236, where he says: "It is a primary rule that the principal of the infants' estate is not to be encroached upon, unless for unavoidable reasons falling little short of necessity: *Walker v. Wetherell* (1801), 6 Ves. 473; *Ex p. McKey* (1810), 1 B. & B. 405."

Had the company made application to the Court for sanction to such expenditure out of capital, previous to its being made, and had frankly informed the Court as to the infant's situation in life, and other circumstances that should be considered, such sanction would, I think, have been refused, except to the extent of a reasonable allowance whilst the infant was at college. The company, however, made the expenditures without previous sanction and at their own risk. A large portion thereof was not necessary or in the infant's interests, but, on the contrary, proved hurtful and should not be approved of by the Court. It would be reasonable to sanction payment to the infant during the time that he was at St. Andrew's College to the extent of \$100.

With this exception, there should be no encroachment on the capital in respect of the various sums allowed or paid by the company to the infant for maintenance; and to this extent the appeal is allowed.

With reference to that branch of the appeal which seeks to charge the company with the loss of certain assets of the estate consisting of books, wearing apparel, jewellery, furniture, and other household effects, the evidence does not shew that any such property came to the company's hands, or that they were guilty of negligence in not obtaining possession thereof. Therefore, this branch of the appeal fails.

Another item of appeal is in respect of the costs in the action of *Rundle v. Trusts and Guarantee Company*. That action was

brought to set aside a release from Clarence Arthur Rundle to the company, and also an order of His Honour Judge Morgan passing the company's accounts, and asking that an account be taken of the dealings of the company with the estate. By consent, the release and order in question were set aside, and it was declared that the order of Judge Morgan was not binding upon the plaintiffs, and that the plaintiffs were entitled to have the accounts re-taken and re-audited in the Surrogate Court, and it was ordered that the costs of the action should be paid as the Judge of the Surrogate Court should determine on the re-taking and re-auditing of the accounts. The learned Judge of the Surrogate Court, having audited and dealt with the accounts, ordered that the costs of the action and the reference should come out of the estate of Lily Rundle.

I do not agree with this disposition of the costs of that action. It has borne fruit to the extent of relieving the corpus of the estate from payment of a large sum of money improperly disbursed by the company, and the plaintiffs, I think, are entitled to the costs of the action.

There will be no costs of the reference or of this appeal to either party.

Perhaps the company would not have made the unwise expenditures in question if the spirit of the Loan and Trust Corporations Act, R.S.O. 1914, ch. 184, had not been departed from. That Act declares what are the powers of trust companies, subsec. (e) of sec. 18 enumerating in careful detail the offices of trust which a trust company may fill. It does not include the office of guardian of the person of an infant, and it was not competent for the company to be appointed such guardian, and the appointment of an officer of the company was an evasion of the spirit of the Act. Evidently the policy of the Legislature is, that the guardian of the person of an infant shall be one standing in *loco parentis* towards him, a person who will exercise quasi-parental control and care of the infant. A corporation, which acts only through its employees, is incapable of properly discharging such duties.

In this case, the company being guardians of his estate, and

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one of their officers being guardian of his person, resulted in the duties of the latter being at times delegated to other of the company's officers as effectually as if the company had been in fact appointed guardians of the infant's person. To the company as administrators of Mrs. Rundle and guardians of the infant's estate, and to the officer appointed guardian of his person, the Surrogate Judge has allowed one sum of \$500 as compensation. It is not a case in which any allowance should be made to the guardian of the infant's person. If he were entitled to any allowance, I would consider \$50 a year a reasonable sum, and will assume that the Surrogate Judge has included that amount, say \$100, in the \$500 in question. Inasmuch, however, as the guardian of the person is not in this case entitled to compensation, such sum of \$100 will be deducted from the \$500 allowed as aforesaid.

Appeal allowed in part without costs.

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[APPELLATE DIVISION.]

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Vendor and Purchaser—Agreement for Sale of Land—Provision for Closing Sale at Fixed Time—Time of Essence—Right of Vendor to Cancel on Default of Purchaser—Extension of Time—New Agreement—Consideration—Importation of Time-clause—Payment of Part of Purchase-money—Refusal of Vendor to Complete Sale on New Day Fixed—Right of Purchaser to Treat Agreement as Terminated—Right to Return of Sum Paid—Subsequent Offer of Purchaser to Carry out Sale—Equitable Relief—Common Law Right of Vendor not Excluded by Special Privilege in Favour of Purchaser.

By a written agreement between the defendant and V., the defendant agreed to sell and V. agreed to buy land owned by the defendant. Thereafter, by a written agreement between V. and the plaintiff, the former agreed to sell the land to the plaintiff, and the plaintiff agreed to buy the same. By the terms of the latter agreement the sale was to be completed on or before the 15th November, and time was to be of the essence of the agreement. The title was in the defendant, and the plaintiff was directed by V. to complete the purchase with the defendant. On or before the 14th November, the title had been accepted, the conveyance approved of and executed by the defendant, and deposited with his solicitor for delivery on the closing of the transaction. On the 15th November, the solicitors for the parties met, but the plaintiff was not ready with the whole of his purchase-money, and it was agreed between the solicitors that the time for completion should be extended until the 17th November, on the plaintiff

paying to the defendant's solicitor \$1,000, which the plaintiff then paid, on account of the purchase-money. On the 17th November, the plaintiff tendered the balance of his purchase-money to the defendant, who refused to accept it, and refused to deliver the conveyance. On the 18th November, the plaintiff notified the defendant that the refusal to complete the purchase on the previous day was regarded as a refusal to carry out the contract and that the plaintiff withdrew from it, and demanded the return of the \$1,000. Subsequently the defendant offered to carry out the contract, but the plaintiff adhered to his position, and brought this action for the \$1,000:—

Held, that the agreement of the solicitors on the 15th November created a new contract between the parties, whereby, in consideration of \$1,000 then paid by the plaintiff to the defendant, the latter agreed to deliver to the plaintiff, on the 17th November, the executed conveyance; that the defendant's conduct on the 17th amounted to an absolute refusal to perform the contract; and that the plaintiff was entitled to treat the contract as at an end, and to the return of the \$1,000.

Judgment of MIDDLETON, J., affirmed.

Held, per MIDDLETON, J., that the new contract made on the 15th was a contract which embodied in it by implication all the appropriate terms of the original agreement, and thus time became and was of the essence of the contract. As soon as the defendant refused to carry out this agreement, he was guilty of a breach, and the right of action in the plaintiff to recover the \$1,000, as upon failure of consideration, became vested in him. An offer to perform after the expiry of the time fixed is not a defence. It may be a ground for application to the Court for equitable relief from the default; but, if the defendant was to be regarded as making such an application, no ground for interference was shewn.

The clause in the original agreement making time of the essence of the contract was followed by a clause giving the vendor the right to treat the contract as cancelled if any of the stipulations as to time, title, etc., were not observed by the purchaser:—

Held, per RIDDELL, J., that the right to treat the contract as cancelled was merely ancillary to the substantial right. The rights annexed by law to a contract in favour of one party thereto are not limited by an express right in excess of those annexed by law in favour of the other. At the common law, time was always strictly of the essence of the contract; and, when time is by express provision made of the essence of the contract, the rights of the parties are still as at the common law. If the vendor is not ready and willing to perform his part of the contract at the time specified, the purchaser may at once bring his action; and it is no answer that the vendor is afterwards able and willing to implement his agreement.

ACTION to recover the sum of \$1,000 paid by the plaintiff, through his solicitors, to the defendant Smith for the defendant Finkleman.

May 26. The action was tried by MIDDLETON, J., without a jury, at Toronto.

D. L. McCarthy, K.C., and *H. E. Wallace*, for the plaintiff.

G. H. Watson, K.C., and *A. L. Fleming*, for the defendants.

June 4. MIDDLETON, J.:—The plaintiff is a clerk in the employ of the National Trust Company, and, as trustee and agent

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for the company, entered into an agreement on the 31st October, 1913. He offered to purchase certain lands for the price of \$20,850, payable \$500 as a deposit with the offer, \$10,000 on acceptance of the offer, the close of sale to be not later than the 15th November, 1913, and the balance to be paid on or before the 15th May, 1914, with interest on the unpaid purchase-money up to the time of payment, from the 15th November. This offer was accepted by Mr. Vanderwater, to whom it was addressed, on the 1st November, 1913. The National Trust Company were purchasing as trustees for some one undisclosed, probably either the Toronto Railway Company or Mr. Fleming, its manager.

When the title came to be searched, the matter was placed in the hands of Messrs. McCarthy, Osler, Hoskin, & Harcourt, solicitors. Mr. Case, who is connected with that firm, was instructed to look after the searching and generally the carrying out of the transaction. Some difficulty was found owing to the fact that Mr. Vanderwater was not the owner of the property, but was entitled to call for a conveyance under an agreement between himself and Mr. Finkleman, one of the defendants in this action. That agreement was not produced, and I have no knowledge as to Finkleman's exact rights under it.

No difficulty arose upon this question, because it was arranged that Finkleman should convey direct to Winnifrith; and an order or direction to him so to convey was obtained from Vanderwater. The purchaser's solicitors were content to accept the direct conveyance.

There are, however, other difficulties arising in connection with the title, and some deficiency in the quantity of land supposed to exist was discovered when a survey was made.

On the 15th November, the day named for closing, Mr. Smith, the other defendant, who represented Mr. Finkleman, and Mr. Bond, who represented Mr. Vanderwater, met Mr. Case at the office of McCarthy, Osler, Hoskin, & Harcourt. The adjustments were made, not only for the purpose of ascertaining the amount to be paid by Mr. Winnifrith, it being arranged that the whole price should be at once paid, but also an adjustment as between Vanderwater and Finkleman. There was an outstanding mortgage, and it was arranged that the amount due the mortgagee

should be deducted; and a comparatively small sum, \$112.50, was to be held in abeyance for a few days until a further report from the surveyor could be obtained.

By the time all these adjustments were made and other matters had been arranged, one o'clock had arrived. Mr. Case then found that the senior members of the firm were away from the office, and apparently the purchase-money was not on hand. He was somewhat chagrined at the situation, and, I think imprudently, telephoned to the Toronto Railway Company's offices to see if he could get the money from Mr. Fleming, without first taking precautions that his conversation could not be overheard. Mr. Fleming was also out, and it became clear that it would be impracticable to close the transaction, owing to the early hour at which banks and registry offices close on Saturday. He asked the other solicitors to allow the matter to stand until Monday. To this they finally agreed, and left the office. They, however, shortly afterwards returned, and Mr. Smith took the position, in which he was backed by Mr. Bond, that Mr. Finkleman had been communicated with and would not allow the matter to stand until Monday unless \$1,000 was paid on the Saturday.

There was no need for any anxiety as to the final closing of the transaction; \$500 had been paid as a deposit; but Mr. Case agreed to pay the \$1,000 asked rather than permit any question to be raised. He therefore paid to Mr. Smith the \$1,000. Mr. Smith was entitled to receive this, as Mr. Finkleman had signed an order directing the money to be paid to his solicitor. Then Mr. Case adopted the precaution of having the extension until Monday evidenced by writing, and a memorandum was signed by the three solicitors, by which they mutually consented to the extension of the closing until Monday the 17th.

On Monday the 17th, apparently, concerted action took place between Smith and his client to frustrate the closing on that day. The money was forthcoming; Mr. Bond was found, and he was apparently willing; but Mr. Smith dodged all endeavours to obtain an appointment. When found, he did not know when he could close; and finally he said that his client had taken away the deed which had been executed some days previously—the

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affidavit of execution is dated the 14th November—and, upon tender of the money being made, he declined to do anything. Tender was made also to Vanderwater, but he repudiated all knowledge of the matter.

The only inference I can draw from the facts proved is, that Smith and his client, having learned enough to lead them to suspect that the Toronto Railway Company was the beneficial purchaser, determined to make use of that fact to secure some additional advantage.

I find as a fact that what took place on the 17th amounted to a deliberate repudiation on the part of Finkleman and his solicitor of all obligation to convey the lands in question and a refusal so to convey.

On the morning of the 18th, there was an entirely unexpected change of heart on the part of Finkleman and Smith. They were then ready to convey. There was likewise a change of heart and desire on the part of the purchaser. The contract having been repudiated and performance of it refused on the 17th, the purchaser claimed to be entirely exonerated therefrom. The purchaser refused on the 18th to carry out the contract of which he sought performance on the 17th, and he also claimed that Finkleman, having refused to convey on the 17th, when he ought to have conveyed, became liable to refund the \$1,000. This action is brought to recover that sum. The \$500 was paid to Vanderwater, and I am not concerned with it.

First, as to Smith. He acted as agent for Finkleman. He received the money as Finkleman's agent. When the money was paid to Smith, it became and was Finkleman's. If there is a liability to refund, that liability is Finkleman's. I, therefore, think the action should be dismissed as to Smith, but I would not give him costs, as I cannot see that costs have been in any way increased by his presence.

Mr. Watson contends, first, that there was no repudiation of the contract on the 17th; that there was no contract closed on the 17th, time not being of the essence of any arrangement that was made; and that, even if there was a repudiation, there is a right, where no harm is shewn to have been done, to reform the contract.

I think this argument is based upon a fundamental misconception. Originally there was no contractual relationship between the parties to this action. The plaintiff's contract was with Vanderwater; the defendant Finkleman's contract was also with him; but there was a parol agreement by which the defendant Finkleman should agree to convey to the plaintiff, on receipt from the plaintiff of the balance due under the defendant Finkleman's contract with Vanderwater. It was known that this was under and in part performance of a contract between the plaintiff and Vanderwater. It was known that time was of the essence of this contract; and, when the plaintiff found himself unable to complete the contract on the 15th, as he had undertaken, the new contract then made, to close on the 17th, was a contract that, I think, embodied in it by implication all the appropriate terms of the original agreement between the plaintiff and Vanderwater, and thus time became and was of the essence of the contract. In consideration of the \$1,000 paid to the defendant Smith for the defendant Finkleman, the defendant Finkleman undertook to hand over the conveyance already executed so as to permit Vanderwater's agreement with the plaintiff to be consummated in that way. As soon as the defendant Finkleman refused to carry out this agreement, he was guilty of a breach of agreement, and the right of action in the plaintiff to recover back the \$1,000 paid, as upon failure of consideration, became vested in him.

The cases on which Mr. Watson relies are cases of a different type. Where a contract is to be performed *in futuro*, one party may, by announcing his intention not to carry out the contract when the time arrives, so repudiate the contract as to confer an immediate right of action upon the other. That other may treat the announcement of the intended breach as giving him a present cause of action, or he may, if he choose, wait to ascertain if default is really made. If he elects to take the latter course, it is open to the repudiating party to change his mind and withdraw his announcement of repudiation, and he is then at liberty to carry out his original contract. But nowhere can be found a case which suggests that an offer to perform after the time fixed constitutes a defence. It may be relied upon in mitigation of

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damages. It may afford some ground for application to the Court for equitable relief, but a tender of a deed on the 18th, when the contract calls for the completion of the sale on the 17th, is not a compliance with the obligation assumed.

This, I think, is the result of all the cases.

If this is to be regarded as an action for specific performance, and an application to the Court for equitable relief from the default, then nothing has been shewn to justify interference. No explanation of the default is vouchsafed. A defence is filed in which charges of fraud are made, and not a scintilla of evidence has been given to support them. Everything indicates that the position in which the defendant Finkleman finds himself is the unexpected result of a piece of sharp practice on his part.

With the rights as between the plaintiff and Vanderwater I am not here concerned, for he is no party to this litigation. I can see nothing which justifies the retention by the defendant Finkleman of this \$1,000, for which he has given nothing.

The defendant Finkleman appealed from the judgment of MIDDLETON, J., in favour of the plaintiff, for the return of the sum of \$1,000.

October 13 and 14. The appeal was heard by MULOCK, C.J.Ex., CLUTE, RIDDELL, and SUTHERLAND, JJ.

G. H. Watson, K.C., and *A. L. Fleming*, for the appellant. The arrangement come to on the 15th November, 1913, was a supplemental agreement, to which the appellant was a party, but time was not of the essence of this arrangement: *Parkin v. Thorold* (1852), 16 Beav. 59, at p. 69. The appellant was not a party to the agreement of the 31st October, 1913; and, therefore, was not bound by the term in that agreement that time was of the essence. What occurred on the 17th did not amount to renunciation. There is no renunciation such as can be treated as a breach unless the acts relied on amount to an absolute and unqualified repudiation of all intention to complete the contract: *Williams on Vendor and Purchaser*, 2nd ed., vol. 2, p. 1041; *Benjamin on Sale*, 5th ed., p. 564. On the 17th, if the appellant refused to complete, the purchaser should have elected

to rescind. As he did not, the contract remained in force: *Cornwall v. Henson*, [1900] 2 Ch. 298, at p. 304; *Johnstone v. Milling* (1886), 16 Q.B.D. 460, at p. 472. Besides, there was not a tender of the full amount of the purchase-money, the purchaser never having tendered the amount of the mortgage-money or the \$112.50 reserved.

D. L. McCarthy, K.C., for the plaintiff, respondent. The defendant absolutely refused to perform the contract, and so repudiated it, as found by the learned trial Judge. Therefore, the plaintiff was entitled to rescind. The contract of the 17th November impliedly contained all the essential terms of the old contract, among which was that time was to be of the essence. As to the amount of the tender, it was well-known to all parties that the purchaser was to assume the mortgage. The judgment appealed from is right, and should be sustained.

Watson, in reply. There was no stipulation in the contract entitling the plaintiff to rescind, and so he could not recede from the agreement: *Williams on Vendor and Purchaser*, 2nd ed., vol. 1, p. 64; *Anson's Law of Contract*, 13th ed., pp. 337, 339, 340; *McNiven v. Pigott* (1914), 31 O.L.R. 365. The provision in the original agreement as to time and right to cancel was one in favour of the vendor, and it excluded any right which the purchaser might have.

November 30. MULLOCK, C.J.Ex.:—This is an appeal from the judgment of Middleton, J. By a written agreement between the defendant Finkleman and one Vanderwater, Finkleman agreed to sell and Vanderwater agreed to buy certain lands owned by Finkleman, situate in the city of Toronto. Thereafter, by a written agreement between Vanderwater and the plaintiff, the former agreed to sell the said lands to the plaintiff, who agreed to purchase the same.

By the terms of this latter agreement the sale was to be completed on or before Saturday the 15th November, 1913, and time was made of the essence of the agreement. The title to the land was in Finkleman, and the plaintiff was directed by Vanderwater to complete the purchase directly with Finkleman. Accordingly negotiations to that end were carried on between the

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solicitors for the plaintiff and Finkleman, and by the 14th November the title had been accepted, the deed approved of and executed by Finkleman, and deposited with his solicitor for delivery on the closing of the transaction.

On the 15th November, the solicitors for all parties met for the purpose of closing the purchase. All that remained to be done was for the plaintiff to pay over his purchase-money, and for the defendant Finkleman to deliver to him the executed conveyance. The plaintiff, however, was not ready with the whole of his purchase-money, and it was agreed between all the parties that, on the plaintiff paying to Finkleman's solicitor \$1,000 on account of the purchase-money, the time for completion should be extended until Monday the 17th November, on which day the purchase-money was to be paid, and Finkleman was to deliver the deed.

In pursuance of this agreement, the plaintiff then paid to Finkleman's solicitor the \$1,000. On Monday the 17th November, the plaintiff had his purchase-money ready to pay over, tendered it to Finkleman's solicitor, to Finkleman himself, and to Vanderwater, but each refused to accept it, and he was unable to obtain the conveyance. On the previous Saturday, it was in the custody of Mr. Smith, Finkleman's solicitor, but on Monday Mr. Smith said that it had passed out of his custody into that of Finkleman.

The evidence justifies the inference that, by design and not by accident, Finkleman refused to deliver the conveyance on the Monday. On the following day, the plaintiff's solicitors, by instructions from the plaintiff, notified the solicitors for the defendant Finkleman and for Vanderwater that the refusal to complete the purchase on the previous day was regarded as a refusal to carry out the contract, and that, in consequence, the plaintiff withdrew from it, and demanded a return of the moneys paid on account. Subsequently, the defendant Finkleman expressed a willingness to complete the sale, but the plaintiff contended that the contract was then at an end, and brought this action to recover the \$1,000 from Finkleman.

Whilst there was no contract for the sale by Finkleman to the plaintiff, what happened on Saturday the 15th November

created a contract between them, whereby, in consideration of \$1,000 then paid by the plaintiff to Finkleman, the latter agreed to deliver to the plaintiff, on Monday the 17th November, the executed conveyance then held in escrow by his solicitor subject to the defendant's order. The defendant refused to deliver the conveyance; and in such case the question is, whether his acts and conduct evinced an intention not to be bound by the contract made between him and the plaintiff: *Freeth v. Barr* (1874), L.R. 9 C.P. 208; *Mersey Steel and Iron Co. v. Naylor Benzon & Co.* (1884), 9 App. Cas. 434.

The inference drawn by the learned trial Judge from the defendant Finkleman's conduct was, that it amounted to an absolute refusal to perform the contract. I do not see what other interpretation could be placed upon it. Where one party to a contract absolutely refuses to perform his part, within the time fixed for such purpose, the other party may accept that refusal and rescind the contract: *Danube and Black Sea R.W. Co. v. Xenos* (1861), 11 C.B.N.S. 152.

This the plaintiff has done, and, treating the contract between him and the defendant Finkleman as at an end, is entitled to a return of the \$1,000.

The appeal should be dismissed with costs.

CLUTE and SUTHERLAND, JJ., concurred.

RIDDELL, J.:—I entirely agree in the findings of fact and conclusions of law of the learned trial Judge, and would have nothing to add but for a point raised during the argument before us.

The contract consists of an offer and an acceptance. In the former appears the following clause (after, *inter alia*, providing that the close of the sale is to be not later than the 15th November): "The above stipulations as to title, time and payments are hereby made the essence of the contract;" and after a comma follows: "and if any such stipulations are not observed by me or my representatives at the time specified, the vendor may treat the contract as cancelled, and all payments forfeited, and may

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resell the property without notice to me or my representatives in such manner and for such price as they (sic) may see fit."

It was argued that the express provision in favour of the vendor excludes the right of the purchaser to consider the contract at an end on the default of the vendor.

I do not think this argument is sound. The term making all stipulations as to time of the essence of the contract is complete in itself, and is in no way connected with or modified by the special privilege given to the vendor in the succeeding clause. It is introduced for the advantage of both parties, and cannot be in any way affected by a clause separate and connected only by the word "and"—a clause which, to my mind, is clearly additional, and not at all explanatory or modificative. That clause gives the vendor the right to treat the contract as cancelled, that is, to treat the default of the purchaser as cancelling the contract, and, in consequence of such default, to retain the payments theretofore made and treat the property as his own. The right to treat the contract as cancelled is merely ancillary to the substantial right.

There might be reason in considering that such an express provision in favour of the vendor excludes any implied power by him; but it has never been considered that express power given in a contract to one party thereto limits by implication the common law rights of the other; and, indeed, we have recently held that the giving of powers by a contract to a party thereto does not limit his common law rights: *Canadian Westinghouse Co. v. Murray Shoe Co.* (1914), 31 O.L.R. 11, at p. 15. That this is so for the other party is *â fortiori*. The rights annexed by law to a contract in favour of one party thereto are not limited by an express right in excess of those annexed by law in favour of the other.

None of the many cases referred to in Broom's Legal Maxims, 7th ed., under the title *expressio unius est exclusio alterius*, suggests any such rule: pp. 491 *sqq.*

At the common law, time was always strictly of the essence of the contract; and, when time is by express provision made of the essence of the contract, the rights of the parties are still as at the common law. If the vendor is not ready and willing

to perform his part of the contract at the time specified, the purchaser may at once bring his action; and it is no answer that the vendor is afterwards able and willing to implement his agreement: *Wilde v. Fort* (1812), 4 Taunt. 334, see p. 341; *Sansom v. Rhodes* (1840), 6 Bing. N.C. 261, at pp. 267, 268, *per* Tindal, C.J., and Bosanquet, J.; *Noble v. Edwardes* (1877), 5 Ch. D. 378 (C.A.), at pp. 393, 394, *per* Jessel, M.R., James and Baggallay, L.JJ.

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Riddell, J.

I think the appeal should be dismissed with costs.

Appeal dismissed with costs.

[APPELLATE DIVISION.]

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SHIPMAN v. PHINN.

Nov. 30.

Ships—Collision in Inland Waters—Action for Damages—Jurisdiction of Supreme Court of Ontario—Negligence—Evidence—Findings of Fact of Trial Judge—Appeal—Contravention of Art. 29—Damages—Both Parties at Fault—Apportionment—Canada Shipping Act, R.S.C. 1906, ch. 113, sec. 918.

The Supreme Court of Ontario has jurisdiction to entertain an action for damages for negligence resulting in the collision of two vessels in inland waters.

Judgment of MIDDLETON, J., 31 O.L.R. 113, affirmed.

Where both vessels in collision are found in fault, sec. 918 of the Canada Shipping Act, R.S.C. 1906, ch. 113, is applicable, and the damages are to be borne equally by the two vessels.

The action was for damages for injury to the plaintiff's schooner by a collision with the defendant's mud-scow, in a river in the Province of Ontario, owing to the defendant's negligence. The defendant alleged negligence of the plaintiff, and counterclaimed damages for injury to his vessel. The action and counterclaim were tried by BOYD, C., who found that both parties were equally to blame, and dismissed the action and counterclaim without costs.

Both parties appealed, but upon the argument before the Court the plaintiff conceded that there was negligence on his part. The defendant contended that, although the captain of his vessel did not blow the first blast, as required by article 29 of the rules of navigation, that neglect was not the cause of the collision:—

Held, that the findings of BOYD, C., on the question of negligence on the part of the defendant, were well supported by the evidence, and the negligence found was sufficient to fix the defendant with liability without considering the omission to blow a long blast, as required by law, on approaching the point of danger; and it was, therefore, unnecessary to decide the question as to the effect of the defendant's default in that regard, or whether the plaintiff had made out a *prima facie* case of negligence on the part of the defendant so as to shift the burden of proof.

Judgment of BOYD, C., varied by directing a reference to assess and apportion the damages having regard to sec. 918 of the Canada Shipping Act.

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APPEAL by the plaintiff from the judgment of BOYD, C., at the trial; and cross-appeal by the defendant from that judgment and from the judgment of MIDDLETON, J., 31 O.L.R. 113, affirming the jurisdiction of the Supreme Court of Ontario to entertain the action.

The action was brought by the owner of a schooner against the owner of a mud-scow to recover damages resulting from a collision in the Napanee river. The defendant counterclaimed damages for injury to his vessel by the collision. Both parties alleged negligence.

The judgment of MIDDLETON, J., was upon the preliminary question of law, raised by the defendant, whether the Court had jurisdiction.

That question being determined in favour of the plaintiff, the action was tried without a jury, by BOYD, C., who found that both parties were equally to blame, and dismissed the action and counterclaim without costs.

September 21. The appeals were heard by MULOCK, C.J.Ex., CLUTE, RIDDELL, and SUTHERLAND, JJ.

F. King, for the plaintiff. The learned Chancellor, having found both vessels at fault, should have applied the rule applicable by virtue of the Canada Shipping Act, R.S.C. 1906, ch. 113, sec. 918, which requires that in such a case the damages shall be borne equally by the two vessels. See Marsden's Collisions at Sea, 6th ed., p. 122. On the question of jurisdiction, I rely on the reasons for judgment of Mr. Justice Middleton in 31 O.L.R. 113, where he holds that this Court has a concurrent jurisdiction in all cases of negligence resulting in collision in inland waters.

H. A. Burbidge, for the defendant. This Court has no jurisdiction over the subject-matter of this action, and the plaintiff must seek his remedy in the Exchequer Court of Canada: *The Picton* (1879), 4 S.C.R. 648; Lefroy's "Canada's Federal System," pp. 145, 149, 150, 189, and 489; *Valin v. Langlois* (1879), 3 S.C.R. 1, at pp. 9, 14, 15, 33, 34, and 67, and 5 App. Cas. 115; *Cushing v. Dupuy* (1880), 5 App. Cas. 409, at p. 415; the Colonial Courts of Admiralty Act, 1890 (Imp.); the Admiralty Act, 1891 (D.); *Re North Perth, Hessin v. Lloyd* (1891), 21 O.R.

538, at pp. 542, 545; *McLeod v. Noble* (1897), 28 O.R. 528. The evidence does not warrant a finding that the defendant's vessel was at fault, and sec. 918 has, therefore, no application. Even if the defendant was guilty of negligence in not blowing the first blast, yet that neglect was not the cause of the accident: *Turret Steamship Co. v. Jenks*, C.R. [1907] A.C. 472; *Cayzer Irvine & Co. v. Carron Co., The Margaret* (1884), 9 App. Cas. 873; *Stoomvaart Maatschappij Nederland v. Peninsular and Oriental Steam Navigation Co.* (1880), 5 App. Cas. 876; Marsden's *Collisions at Sea*, 6th ed., pp. 170, 171, 174, and 190. Even if the defendant broke a regulation, the burden of proof was upon the plaintiff: Halsbury's *Laws of England*, vol. 26, para. 726; *The "Cuba" v. McMillan* (1896), 26 S.C.R. 651; *The "Arranmore" v. Rudolph* (1906), 38 S.C.R. 176; *Tucker v. The "Tecumseh"* (1905), 6 O.W.R. 131.

King, in reply. There is sufficient evidence to support the learned Chancellor's findings of negligence of the defendant, outside the omission to blow a blast of the whistle: for instance, there was evidence that he failed to slow down. Therefore, the burden of proof is not shifted to the plaintiff: Marsden's *Collisions at Sea*, 6th ed., p. 29; *Inman v. Reck, The "City of Antwerp" and The "Friedrich"* (1868), L.R. 2 P.C. 25.

November 30. The judgment of the Court was delivered by CLUTE, J.:—This is an action for damages arising out of a collision between the plaintiff's schooner and the defendant's mud-seow, at a bend in the Napanee river. The plaintiff's schooner, loaded with coal, was being towed from Deseronto to Napanee by the steam-tug "Ray Stanton," and, while proceeding up the Napanee river, met the defendant's seow, which was being towed down the river by a tug "Maggie R. King," in the employ of the defendant. The plaintiff charges that the defendant "so improperly and negligently navigated his tug and mud-seow that the said mud-seow came in collision with the plaintiff's said schooner, the corner of the said mud-seow striking the schooner on the port-bow with such force as to cut the said schooner down from below the rail to a point in her hull below the water, so that she shortly afterwards sank." The defendant denied the jurisdiction

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of this Court over the subject-matter of the action, and that question was decided by Middleton, J., 31 O.L.R. 113, in favour of the plaintiff prior to the trial of the action, the order providing for an appeal to be taken with any appeal from the judgment at the trial of the action.

The Chancellor, who tried the case, found that both parties were equally to blame, and dismissed the claim and counter-claim without costs. From this judgment both parties appeal.

The plaintiff claims that where both vessels are found in fault, as they were by the judgment in question, the rule applicable by virtue of the Canada Shipping Act, R.S.C. 1906, ch. 113, sec. 918, requires that the damages shall be borne equally by the two vessels. The defendant's cross-appeal is both upon the facts and upon the law, his contention being that the Exchequer Court alone has jurisdiction in the premises: and that the defendant's vessel was in no way in fault; and, if it were, such fault did not in any way contribute to the collision; that the plaintiff's vessel was alone at fault, and that sec. 918 has no application to this case.

All questions of law were disposed of upon the argument, the Court holding that it had jurisdiction to try the case, and that sec. 918 applied. The only question reserved was one of fact.

Upon the argument it was conceded by the plaintiff that there was negligence on his part. The defendant contended, however, that, although the captain did not blow the first blast, as required by article 29, yet that neglect was not the cause of the accident.

The learned Chancellor found that "the defendant's crew were to blame because they did not regard this stipulation in article 29, in sounding a long blast when they were within half a mile from this point. Both parties knew, or must be taken to have known, that that bend was the critical part of the river, the most difficult part to get around. One man on the plaintiff's side did observe that, and sounded his whistle. Unfortunately, from the direction of the wind or some other cause, or the inadequacy of the whistle, that did not reach the ears of those on board the defendant's craft. I have taken that as a fact, that they did not hear this signal. On the other hand, they did not give the signal, whether they heard the plaintiff's or not, which it was their

business, under the article, to have sounded at that point. It is all in conjecture upon the evidence as to what would have happened if they had sounded that signal. Of course, if the plaintiff had the foresight he has as aftersight, he would have slowed up at that point; but there is no evidence that he would have done so, that he would have changed his course in any way had that whistle been sounded. Then, again, it is to be observed that the defendant's men were put on the alert as to what was coming, even without the signal, because they saw the spars of the schooner. They did not see anything else, but they saw that there was no sails on those spars, and they must have seen that those spars were moving; therefore, they must have inferred, if they were giving any reasonable attention to the matter, that it was a schooner of considerable size approaching under tow, and it lay on them to get their gear in proper condition to meet that contingency at that particular point. They went on at their usual speed of three and a half miles an hour. . . . The defendant's men, coming on, knew that there was going to be difficulty at that bend with this big schooner, and it was their business to have their gear in proper order and their scow in proper line. Their scow was sticking out ten and a half feet according to the plaintiff's evidence; at all events it was projecting out of the line of the tug. If that scow had been in proper position to meet and to pass the other boat in that channel, there would have been no accident. So I think the defendant was to blame in that regard."

An examination of the evidence makes it clear that the finding of the Chancellor on the question of negligence on the part of the defendant is well supported by the evidence. It is sworn by Shipman (p. 53 of the evidence) that, if the plaintiff had received an answer to his signal, it would have been possible to slow down and meet the approaching danger in a different part of the river, and that he would have done so, and thus the collision would have been avoided—that a difference of one or two minutes would have prevented the accident.

Grant Pyx, captain of the tug towing the plaintiff's schooner, states that, as they were approaching the bend of the river

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where the collision took place, he blew one long blast (this was between a quarter and a half mile from the bend). He received no answer, and advanced further about an eighth of a mile beyond the point where the blast was given, when he received a signal from the defendant's tug, which he immediately answered, and slowed down. She blew one blast to pass to starboard side—"We expected that he intended coming round the bend, and therefore slowed down as slow as possible" so as to let the defendant get round the bend before the plaintiff had arrived there. He states further that, if their first blast had been answered, or if the defendant's tug had given the blast as required by law, there would have been plenty of time for the defendant's tug to get around the bend, and there would not have been the least danger.

William Dolmage was captain of the plaintiff's schooner, the "Winnie Wing." He says that the first thing he noticed in approaching the bend was, that the tug towing the "Winnie Wing" blew a long blast; it was then between a quarter and a half mile from the bend. They got no reply to the blast. When they were near the bend, the tug "Ray Stanton" blew another long blast, but still there was no reply. He thinks the third time they blew they got a short blast. They were pretty close to the bend. Their tug had slowed down before that, as they neared the bend. He states that, if they had received a signal from the other tug when she was a half mile from the bend, there would have been no collision.

The evidence of Frank Rickley, wheelman, who was at the wheel of the "Winnie Wing," is to the same effect.

Captain Brewster, in command of the tug "Maggie King," admits that he did not give the long whistle in approaching the point of danger, as provided by article 29, but endeavours to excuse himself by stating that it was not the custom to do so.

As there is ample evidence to support the findings of the Chancellor as to the negligence of the defendant, aside from the omission to blow a long blast, as required by law, on approaching the point of danger, it is unnecessary to decide the question as to the effect of the defendant's default in that regard, or whether the plaintiff had made out a *primâ facie* case of negligence on the

part of the defendant so as to shift the burden of proof, unless he was able to prove that *that* negligence in no way contributed to the loss. See Marsden's Collisions at Sea, 6th ed., p. 29; *Inman v. Reck, The "City of Antwerp" and The "Friedrich,"* L.R. 2 P.C. 25; *Cayzer Irvine & Co. v. Carron Co., The Margaret*, 9 App. Cas. 73; *Ayles v. South Eastern R.W. Co.* (1868), L.R. 3 Ex. 146. The Chancellor states that there is no evidence that the plaintiff would have changed his course in any way if the whistle had been sounded. It might have been necessary to consider whether, the defendant being admittedly in default in respect of a statutory duty, it did not devolve upon him to satisfy the Court that, had the whistle been blown, it would have made no difference; but consideration of this question becomes unnecessary owing to the other findings, upon sufficient evidence, of the defendant's negligence.

The result is, that the plaintiff's appeal is allowed with costs, and the defendant's appeal is dismissed with costs.

As the parties have agreed upon the place of reference, it is referred to the Master at Kingston to assess and apportion the damages having regard to sec. 918 of the Canada Shipping Act, with power to deal with the costs of the reference.

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[APPELLATE DIVISION.]

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Mines and Minerals—Injury to Miner—Explosion of Charge in Drilled Hole—Negligence—Defective System—Evidence—Contributory Negligence—Findings of Jury—Statutory Duty of Mine-owners—Mining Act of Ontario, R.S.O. 1914, ch. 32, secs. 164, 174, 175.

The plaintiff was engaged in running a drilling machine in the defendants' mine, and was injured by an explosion from a loaded hole, one of nine which he had himself loaded on the previous day; he knew that there had been only eight reports, and so notified the men in the night-shift, who went into the mine four hours after he left it. When the plaintiff went back to work the next day, he was not notified that the charge in the ninth hole had not yet exploded, and he saw no indication of a missed hole. He had drilled in about two feet when the charge exploded; he stated that he would not have drilled if he had been warned about the missed hole. He was employed by a person to whom the defendants had let a contract for the drilling, but was paid by the defendants, the mine-owners. In an action to recover damages for his injury, the jury found that the injury was the result of negligence on the part of the defendants,

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in that they had no system of reporting from one shift to another, that they neglected to have proper inspection, and, in the circumstances in which the plaintiff was engaged to do the work, it was their duty to have the work inspected daily and reported on to the proper officials. The jury also negatived contributory negligence:—

Held, that the evidence supported the findings of the jury.

Held, also (RIDDELL, J., *dubitante*), upon a consideration of the provisions of the Mining Act of Ontario, R.S.O. 1914, ch. 32, especially sec. 164, rules 14, 15, 80, and 98, and secs. 174 and 175, that the duty of seeing that the provisions of the Act are carried out is imposed upon the mine-owner, as well as upon others, and that the defendants were responsible for a disregard of their statutory duty in the working of the shaft where the plaintiff was injured. There was no shift boss, or mine captain, or superintendent other than one who was superintendent at another mine of the defendants, and who visited and inspected the work once or twice a week. Whether the plaintiff was to be regarded as working under the contractor or for the defendants was not important—it was for the defendants to see that the requirements of the statute were carried out.

Grant v. Acadia Coal Co. (1902), 32 S.C.R. 427, *Britannic Merthyr Coal Co. v. David*, [1910] A.C. 74, and *Butler v. Fife Coal Co.*, [1912] A.C. 149, specially referred to.

Judgment of KELLY, J., affirmed.

APPEAL by the defendants from the judgment of KELLY, J., at the trial, upon the findings of a jury, in favour of the plaintiff, in an action for damages for personal injuries sustained by the plaintiff while working in the defendants' mine.

The plaintiff was engaged in running a drilling machine in the mine, when an explosion occurred. The plaintiff alleged that the defendants were guilty of negligence in leaving with a charge in it a hole which had been fired but had not exploded, and which afterwards exploded, causing the injuries complained of.

October 5. The appeal was heard by MULOCK, C.J.Ex., CLUTE, RIDDELL, and SUTHERLAND, JJ.

N. W. Rowell, K.C., for the appellants. This is a case under the Mining Act of Ontario, R.S.O. 1914, ch. 32, sec. 164, in which the rules for the protection of miners are set forth. Rule 15, under this section, refers to the proper procedure where a "missed hole" occurs, such as caused the accident now in question. Under sec. 175 of the Act, the liability for such an accident rests on the contractor, and not on the owner. The nearest case seems to be *Howitt v. Nottingham and District Tramways Co. Limited* (1883), 12 Q.B.D. 16. Reference was also made to *Barnett v. Poplar Corporation*, [1901] 2 K.B. 319; *Aldred v. West Metropolitan Trams Co.*, [1891] 2 Q.B. 398. These cases

were decided under the Tramways Act of 1870 (Imp.), secs. 28, 29, 55. He also referred to Halsbury's Laws of England, vol. 20, para. 296; *Reedie v. London and North Western R.W. Co.* (1849), 4 Ex. 244, and contended that the plaintiff had failed to make out a case which entitled him to go to the jury.

A. G. Slaughter, for the plaintiff, the respondent, referred to *Dallantonio v. McCormick* (1913), 29 O.L.R. 319. The plaintiff was only a miner, and his duties, when a hole misses fire, are set out in rule 14 under sec. 164 of the Mining Act. He had done all that was reasonable and proper under that rule, as there was no shift boss to whom he could report the missed hole. When he came to work on the day of the accident, he found a condition of things which entitled him to believe that everything was right.

Rowell, in reply.

November 30. CLUTE, J.:—Appeal from the judgment directed by Kelly, J., to be entered on the findings of the jury, on the 23rd May, 1914.

The plaintiff on the 20th May, 1913, was engaged in running a drilling machine in the defendants' mine, and was injured by an explosion from a loaded hole, which had been fired but had not exploded.

The story of what occurred is given by the plaintiff and another witness. It would appear from the evidence that the defendants had let a contract to sink a shaft of 100 feet and then drift 600 or 700 feet upon a property about a mile and a half from their principal mine.

Poisson says that there was an arrangement that he was to have \$10 a foot, and if that amounted to less wages than \$3.50 per day the defendants were to pay him and his men at that rate, and when he ran behind the defendants paid the wages accordingly of him and the one who worked with him. The superintendent of the mining company was one Brown, and the captain, Macmillan. Brown came and inspected the work once or twice a week. There was no special mine captain assigned to this mine. It seems to have been worked in connection with the company's mine at Cobalt, the inspection and oversight being by officers of

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the defendants. He states that there was no special captain or shift boss at this mine.

The plaintiff states that he got his powder from the defendants, brought there by their team. On the 19th, after drilling four or five holes, he loaded these holes and those drilled by the previous shift, making nine holes loaded by him. The nine holes were fired, but there were only eight reports. That was about 3 o'clock in the afternoon. The plaintiff and his partner did not go back to drill further on that day; there was too much smoke; it would take a couple of hours before the smoke would come out; that would bring it to about 5 o'clock, which was the regular quitting time. The night shift was going on at 7 o'clock. Before leaving the mine, the plaintiff left a note there stating that a hole had missed fire; the note was left by the candlestick which the next shift would take, "so that they would see the paper." That was the practice. The plaintiff told the blacksmith and the hoist-man that they might mention it also to the next shift.

The next morning, when the plaintiff returned to take his shift after the night shift had come off, the hoist man, Poisson, and the blacksmith were all there, but he received no message from any of them with reference to the missed hole. The plaintiff and his helper went down to the face of the drift, looked it over, and started to drill. Some work had been done during the night. The drill was set up ready to work; there had been three holes drilled during the night. There was some muck at the bottom of the drift. He examined the face of the drift with a candle. He found a piece of rock (called a "toe") sticking out further than the rest of the drift. They saw no indication of a missed hole. When they had drilled in about two feet, an explosion took place, and the plaintiff received the injuries complained of. He states that if he had been warned that there was any hole not exploded he would not have drilled. The plaintiff's partner was killed. The plaintiff states that no mine captain or shift boss had reported to him anything in connection with the fact that there was a missed hole on the work he had taken up. He states that when there is a missed hole the practice is to shoot that over again before starting to drill other holes. In answer to a juryman, he stated that part of the muck

had been cleared away, but some muck had fallen down after they started to drill. He states further that, supposing the night shift had found the missed hole and shot it over again, and muck had fallen from that, they would have cleared it back.

The plaintiff's position would appear to be that, he having given notice that there was a charged hole that had missed fire, it became the duty of the defendants so to manage their mine under the Act that he would be notified if it had not been fired, and in that case he would not have commenced drilling on the face of the drift where there was still a charged hole.

The following are the questions submitted to the jury and their answers:—

1. Was the injury to the plaintiff the result of negligence or was it a mere accident? A. Negligence.

2. If the injury to the plaintiff was the result of negligence, was there negligence on the part of the defendants which caused or contributed to the injury? A. Yes.

3. If there was such negligence on the part of the defendants, state fully and clearly what were the acts or act or omissions or omission of the defendants which caused or contributed to the injury? A. First, omitting having any system of reporting from one shift to another. Second, as the company had no agreement with Poisson of being liable for any accident, *it was there (sic) duty to have the work inspected daily, and reported on to the proper officials.*

4. Could the plaintiff, Danis, by the exercise of ordinary or reasonable care, have avoided the accident or injury? A. No. He took every precaution that could be expected of him.

5. If so, what should he have done or omitted to do to avoid the accident or injury?

6. If on the answers you give to the above questions the Court should be of opinion that the plaintiff is entitled to damages, what amount of damages do you assess? A. \$6,000.

7. What do you find to be the earnings of a person in the plaintiff's grade of employment for the three years preceding this happening? A. \$3,375.

The negligence found is in effect that the defendants had no system of reporting from one shift to another, and that they

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neglected to have proper inspection, and, under the circumstances under which the plaintiff was engaged to do the work, it was their duty to have the work inspected daily and reported on to the proper officials.

The jury having assessed the damages at \$6,000, the record was amended so as to claim that amount.

The grounds taken in the notice of appeal are: (1) that the judgment was against law and evidence; (2) that the findings of the jury were perverse and unwarranted by the evidence.

Having carefully read the evidence, I think it amply supports the findings of the jury. The mine seems to have been run in a very haphazard manner, with very slight, if any, oversight or direction from the company. It was urged, however, that the company were in no way responsible for this, and that the plaintiff's remedy, if any, was against Poisson.

The case turns, I think, upon the requirements of the Mining Act of Ontario, R.S.O. 1914, ch. 32, and of the Workmen's Compensation for Injuries Act, R.S.O. 1914, ch. 146.

The Mining Act, sec. 164, rule 40, provides that "the manager or captain or other competent officer of every mine shall examine at least once every day all working shafts, levels, stopes, tunnels, drifts, crosscuts, raises, signal apparatus, pulleys, and timbering in order to ascertain that they are in a safe and efficient working condition, and he shall inspect and scale, or cause to be inspected and scaled, the walls and roofs of all stopes or other working places at least once every week."

It is quite clear from the evidence that this was not done. Had there been a daily examination by a competent officer, the fact reported by the plaintiff, that one charged hole had not exploded, would have been known, and it is a fair inference that proper directions would have been given to have it exploded before further drilling took place. Rule 98 of sec. 164 points to this. It provides that "there shall always be enforced and observed by the owner and the agent of a mine, and by every manager, superintendent, contractor, captain, foreman, workman and other person engaged in or about the mine, such care and precaution for the avoidance of accident or injury to any person in or about the mine as the particular circumstances of the

case require; and the machinery, plant, appliances and equipment and the manner of carrying on operations shall always, and according to the particular circumstances of the case, conform to the strictest considerations of safety."

Here, according to the findings of the jury, there was for one thing a lack of system or reporting from one shift to another; and to that, I think, can be fairly traced the cause of the accident.

Rule 14 provides: "When a miner fires a round of holes he shall count the number of shots exploding. . . . If there are any reports missing he shall report the same to the mine captain or shift boss. If a missed hole has not been fired at the end of a shift, that fact, together with the position of the hole, shall be reported by the mine captain or shift boss to the mine captain or shift boss in charge of the next relay of miners, before work is commenced by them."

There was no system established in the mine nor shift boss appointed to carry out the directions of this provision.

Rule 15 provides that "a charge which has missed fire shall not be withdrawn, but shall be blasted, and no drilling shall be done in the working place where there is a missed hole or cut-off hole containing explosive until it has been blasted."

Here is an express and positive provision as to what shall be done, under the circumstances as they existed in the mine; and disregard of it caused the injury to the plaintiff. There can be no doubt, I think, upon the evidence, that there was no reasonable attempt on the part of the company to make provision by proper oversight and officers to give effect to this provision of the Act.

The question is, whether the defendants are responsible for this disregard of the Act. It is contended by the defendants that this section does not apply to the defendants in this case, as it is said that Poisson was there in the capacity of contractor, and in that case sec. 175 applies. It reads: "Where work in or about a mine is let to a contractor or sub-contractor, he shall comply and enforce compliance with all the rules and provisions of Part IX. and shall in any case of non-compliance there-

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with be guilty of an offence and punishable in like manner as if he were owner or agent."

Part IX. covers secs. 157 to 175 inclusive. Section 174 declares that "non-compliance with any rule contained in section 164 or with any other provision of Part IX. shall be an offence against Part IX. of this Act, of which the owner and the agent of the mine and every manager, superintendent, captain, foreman, workman and other person engaged in or about the mine shall each be guilty."

Reading this and other sections of the Act, I am of opinion that the duty of seeing that the provisions of the Act in its application to mining are carried out is imposed upon the mine-owner, as well as upon others, and that in this case the defendants are responsible for a disregard of their statutory duty in the working of this shaft where the plaintiff was injured.

According to Poisson's evidence, there was no shift boss or captain or superintendent other than Brown, who was superintendent at another mine of the defendants. There was no official or mine captain or boss there that night or at the time Poisson went off duty the night before the accident, and he said that there had been none before that; that there was no superintendent or shift boss or mine captain there for two or three days before the accident; he further says that shift bosses did not work. In view of the evidence, I do not think it important whether the plaintiff may be regarded as working under Poisson or for the company by whom he was paid. It was the company's duty to see that the requirements of the statute were carried out.

The plaintiff, I think, was properly acquitted of negligence. The jury declared that he could not, by the exercise of ordinary care, have avoided the accident, and that he took every precaution that could be expected of him. The evidence warrants this finding. The trial Judge took especial care to bring before the jury the requirements of the Act, and their findings must be regarded with reference to the charge. There was, I think, ample evidence to support the findings.

In *Grant v. Acadia Coal Co.* (1902), 32 S.C.R. 427, the defendant company employed competent officials for the superin-

tendence of their mine, and required that the statutory requirements should be observed. A labourer was sent to work in an unused balance, which had not been fenced or inspected, and an explosion occurred, from the effects of which he died. In an action by his widow it was held that, as the company had failed to maintain the mine in a condition suitable for carrying on their works with reasonable safety, they were liable for the injuries sustained by their employee, although the explosion may have been attributable to a neglect of duty by a fellow-workman.

See, also, *Vancouver Power Co. v. Hounscome* (1914), 49 S.C.R. 430.

The maxim *volenti non fit injuria* is not applicable in relief of a defendant guilty of a violation of a statutory duty such as is imposed by the Factories Act: *McClemont v. Kilgour Manufacturing Co.* (1912), 27 O.L.R. 305.

Where the defendants employed a contractor to construct a bridge in conformity with the provisions of an Act of Parliament, but, before the works were completed, the bridge, from some defect in its construction, could not be opened, and the plaintiff's vessel was prevented from navigating the river, it was held that the defendants were liable for the damage thereby caused to the plaintiff: *Hole v. Sittingbourne and Sheerness R.W. Co.* (1861), 6 H. & N. 488.

Where an explosion in a mine was caused by a blasting operation conducted in breach of the rules of the Coal Mines Regulation Acts, in an action against the mine-owners to recover damages for injury to a miner by the explosion, the trial Judge held that the burden of proof that the owners had neglected their duty to enforce the statutory rules lay on the plaintiff, and, as the plaintiff had failed to produce evidence on that point, the defendants obtained a verdict and judgment. Held, on appeal to the House of Lords, that upon the question whether the mine authorities had done their duty in taking care of the safety of the miners, the burden of proof did not lie upon the plaintiff: *Britannic Merthyr Coal Co. v. David*, [1910] A.C. 74.

In *Butler v. Fife Coal Co.*, [1912] A.C. 149, in an action for damages at common law and under the Employers' Liability

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Act, 1880, it was found that the defenders were liable, inasmuch as they failed to appoint officers competent for the working of the mine. On appeal, the Court of Session held that the defenders were not liable at common law, having used reasonable care in appointing managers of the necessary qualification and experience; that, although there had been a breach of the special rules applicable to the mine, these rules prescribed the duties of the managers and firemen, and imposed no duties directly on the owners of the mine; but the defenders were liable under the Employers' Liability Act in respect of the negligence of their servants and their failure to comply with the rules in question. Held, on appeal to the House of Lords, that there was a duty on the defenders as owners of the mine to appoint and keep in charge persons competent to deal with the dangers arising in the mine; that they had not discharged this duty, and were therefore liable at common law for the sum awarded. In the course of his judgment Lord Kinnear, at p. 159, said: "The main ground on which the judgment on this point was impugned by the appellant's counsel was that the statute imposes the duties which are found to have been neglected absolutely and directly upon the mine-owners; and therefore that they have a good ground of action independently of negligence. I agree that if an absolute duty is imposed upon mine-owners by statute they must be liable absolutely to those for whose benefit it is imposed; and that if the things so required to be done are not done, it will be no answer to say that the failure is not owing to any default or omission of theirs." Referring to *Britannic Merthyr Coal Co. v. David*, he says, at p. 166: "Your Lordships in that case held that, when an action had been brought for an injury caused by a contravention of the rules, the question as between the plaintiff and the mine-owners was whether the contravention had happened notwithstanding that the mine-owner had done all in his power to prevent its happening, and that the burden of proving that he had performed that duty, which was cast upon him for the safety of his workmen, lay upon the mine-owner."

In the present case the duty imposed by statute upon the mine-owner is clear and positive. There was not only no evi-

dence on the part of the defendants that they had discharged their duty, but, on the contrary, there was positive evidence that they had not; nor did they carry on their business in such a manner that the requirements of the statute could be carried out. The meaning of the jury's finding, having regard to the statute, is, that the defendants' system was faulty in not making provision for a system of reporting to cover the danger arising in the case where a charged hole had not exploded.

I think the judgment as directed to be entered upon the findings of the jury is right, and that this appeal should be dismissed with costs.

MULOCK, C.J.Ex., and SUTHERLAND, J., agreed.

RIDDELL, J.:—I have read the judgment of my brother Clute which is concurred in by my Lord and my brother Sutherland.

I cannot say that I am at all sure that the statute is correctly interpreted in that judgment, or the judgment appealed from: it seems to place too heavy a burden upon the owners of the mine under a statute which is at best doubtful.

Gravely to doubt is to affirm: and I do not feel strongly enough against my brethren to dissent formally.

It is to be hoped that the statute may be made clear either by the Supreme Court or by legislation.

Appeal dismissed with costs.

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[APPELLATE DIVISION.]

Nov. 30.

HURST V. MORRIS.

Mechanics' Liens—Material-man—Time for Registering Lien — Mechanics and Wage-Earners Lien Act, R.S.O. 1914, ch. 140, sec. 22 (2)—Time when "Last Material" Furnished—Application of Material to Contract—Trifling Item Long after Furnishing of Bulk of Material—Lien not Confined to Last Item.

By sec. 22 (2) of the Mechanics and Wage-Earners Lien Act, R.S.O. 1914, ch. 140, "a claim of lien for materials may be registered before or during the furnishing or placing thereof, or within 30 days after the furnishing or placing of the last material so furnished or placed."

The plaintiff supplied lime to the contractor for the brickwork of a building being put up for the defendant. From the 5th November, 1913, till the 23rd December, 1913, there were items in the plaintiff's account for lime supplied on nearly every day; but after the last date there was no item until the 26th January, 1914, when two bags of lime were delivered, worth 85 cents. The plaintiff's claim for lien was not registered until the 25th February, 1914:—

Held, upon the evidence, that the lime delivered on the 26th January was for work done under the contract between the contractor and the defendant.

(2) That the validity of the claim for lien was not affected by the fact that the last item, by reference to which the registration was in time, was a small one, and that the material was furnished some time after the bulk. The amendment of the Act in 1896, by 59 Vict. ch. 35, sec. 21 (2), removed any difficulty in this respect.

Review of the authorities before and since the amendment.

(3) That the plaintiff's lien was not confined to the 85 cents, but comprised all the items of his account. It is now immaterial whether the material is furnished under one contract or more; and the right is independent of the completion of the work.

APPEAL by the defendant from the judgment of an Official Referee in a proceeding for the enforcement of a mechanic's lien.

The following statement is taken from the judgment of REDDEL, J.:—

One Arthur Bell had a contract for the brickwork on a building being erected for the defendant. The plaintiff supplied him with certain materials to be used in his contract. He was not paid, and on the 25th February, 1914, he registered his claim for lien. The matter came on for trial before Mr. Roche, Official Referee, who gave judgment in favour of the plaintiff. The defendant now appeals.

The account of the plaintiff is for lime. It begins with the 5th November, 1913, and, with very frequent, indeed almost daily, items, comes down to the 23rd December; then there is no item till the 26th January, 1914, when two bags of hydrated lime

were delivered, worth 85 cents. Admittedly, unless this item gives the right to enforce a lien, there is none, as the rest of the account was too early to satisfy the statute.

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October 9 and 13. The appeal was heard by MULOCK, C.J.Ex., CLUTE, RIDDELL, and SUTHERLAND, JJ.

J. M. Langstaff, for the appellant, argued, first, that the evidence shewed that the material delivered on the 26th January was not applied on the contract which Bell had with the defendant; even if it was so applied, the amount was too small to extend the time for filing a claim: *Neill v. Carroll* (1880-1), 28 Gr. 30, 339; *Summers v. Beard* (1894), 24 O.R. 641; Wallace on Mechanics' Liens, 2nd ed., p. 7; Holmsted on Mechanics' Liens, p. 116; *Dole v. Bangor Auditorium Association* (1901), 94 Me. 532. At any rate, the lien could only be for 85 cents, the price of the material delivered on the 26th January, there being no prevent general arrangement between the parties: *Chadwick v. Hunter* (1884), 1 Man. R. 39; *Morris v. Tharle* (1893), 24 O.R. 159.

H. H. Shaver, for the plaintiff, respondent, contended that the material in question was applied upon the contract, as shewn by the evidence. As to the amount being too small to extend the time, the cases cited in support of the appellant's contention in this regard were all decided prior to 1896, when an amendment was made in the law by the Mechanics' and Wage-Earners' Lien Act of that year, 59 Vict. ch. 35, and have now no application, and the claim may now be filed within 30 days of the furnishing or placing of the last material, irrespective of the amount. The change in the statute in 1896 also disposes of the argument that the lien could be for 85 cents only. He referred to 59 Vict. ch. 35, sec. 21(2), R.S.O. 1914, ch. 140, sec. 22(2); to *Barrington v. Martin* (1908), 16 O.L.R. 635; and also to a case decided before the change in the Act, *Lindop v. Martin* (1883), 3 C.L.T. 312.

Langstaff, in reply.

November 30. The judgment of the Court was delivered by RIDDELL, J. (after setting out the facts as above):—There are three contentions by the defendant in this appeal: (1) that the material mentioned in the item in question was not applied on the

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contract which Bell had with the defendant; (2) even if it was, the amount is too trifling to extend the time for filing the claim; and (3) in any event the lien is only to the amount of 85 cents, the amount of the item. Each of these contentions will be considered, although it will be seen from what appears in this judgment that the first two are wholly immaterial.

(1) The evidence of the contract is not very satisfactory. The contract is not produced, nor the tender, but it sufficiently appears that the contract was to do the brickwork on the building, including in this the forming of certain recesses for radiators. Some time after the work was thought to be complete, Start, who was acting for the owner as architect, discovered that the radiator recesses were much too wide. There were also certain holes in the side of the building which had been placed too low. He called upon Bell to make the recesses narrower and fill up the other holes higher; Bell did so without demur, and did not charge anything for this work, nor did the defendant or Start offer or suggest any payment. There is no pretence that Bell could now collect any remuneration for this work. Start says "it is a matter of opinion" whether Bell's work could be said to have been completed before these matters were made right. It was for this work the lime was supplied. James Bell, who seems to have been doing Arthur Bell's work, says explicitly that the lime was used on that contract, "finishing the job." There is no contradiction of this; and I think it sufficiently appears that the work thus done was in fact finishing the job, and was part of the contract.

(2) Then we are pressed with certain cases which, it is claimed, lay down the principle that a small amount of work done under a contract, some time after most of the work has been done, will not extend the time for filing a claim.

The first case is *Neill v. Carroll*, 28 Gr. 30, 339, which was under R.S.O. 1877, ch. 120, secs. 3, 4. Section 3 gives any one furnishing machinery in connection with a building, a lien. Section 4 directs that the claim shall be filed within 30 days "from the supplying or placing of the machinery aforesaid." Certain machinery had been supplied and placed in the building, but certain imperfections were discovered and remedied by the

plaintiffs. Spragge, C., said (p. 32): "The thing contracted for was, in the language of the Act, supplied and placed in September; and there being a defect in some detail did not make it the less supplied and placed. The evidence indeed shews that it was more than supplied and placed; it was used and worked, and accepted." Proudfoot, V.-C., agreed with the Chancellor (see the note in 24 O.R. p. 643), while Blake, V.-C., thought the time was extended by the correction of the imperfections. It is not without significance that the bill for the work had been rendered and a note given for the price before the imperfections were corrected.

Summers v. Beard, 24 O.R. 641, was a case on the Act R.S.O. 1887, ch. 126, as amended by 53 Vict. ch. 37. Certain steel work, including some bolts, was furnished for and placed in the building by the end of June, 1893, and a little extra work done as late as the 20th September. On the 17th October, the architect complained that some of the bolts projected too far, and on the 25th October they were cut down. Section 21 of the revised Act provided that the claim must be filed within 30 days from the completion of the work or from the supplying or placing of the machinery. Falconbridge, J. (now Chief Justice of the King's Bench), held, following *Neill v. Carroll*, that "the repairs to the work done . . . did not have the effect of extending the time for registering or enforcing the lien."

In *Day v. Crown Grain Co.* (1906), 16 Man. R. 366, machinery had been supplied and accepted. The plaintiff treated the contract as completed, and the defendants said that it operated completely to their satisfaction, and that there were no defects. The Court held that, even if the plaintiff should on making a test find defects, the remedying of these would not extend the statute. This was reversed in the Supreme Court of Canada: *Day v. Crown Grain Co.* (1907), 39 S.C.R. 258; and the judgment of the Supreme Court was affirmed by the Judicial Committee: *Crown Grain Co. v. Day*, [1908] A.C. 504.

In *Dole v. Bangor Auditorium Association*, 94 Me. 532, the contractor had finished his contract on the 27th November, 1897, and notified the inspector that the work was ready for inspection.

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Inspection was not made till October, 1898, when the contractor was notified that a cut-off was necessary. This the contractor put in but not under his original contract, as he charged for it. It was held that he did not thereby open up the contract of a year previous, and so become entitled to enforce a claim for lien for the old contract.

Without expressing any opinion on these cases, it is obvious that they are far from establishing a rule "that 'a completion' means substantial completion." Materials or machinery already placed are not displaced by a trifling addition to or subtraction therefrom; but, unless the maxim *de minimis non curat lex* applies, material supplied later than the bulk is none the less material supplied within the meaning of the Act.

Most of the difficulties under the old Acts were got rid of by the Act of 1896 (59 Vict. ch. 35), which made a clean sweep of the old legislation and made the law consistent and reasonable: *Barrington v. Martin*, 16 O.L.R. 635; *Cole v. Pearson* (1908), 17 O.L.R. 46. Now the provision is that a claim for a lien for materials supplied may be filed within 30 days after the furnishing or placing of the last material so furnished or placed, and no difference is made or suggested between a large and a small amount.

(3) But it is claimed that, even if a lien does attach and is enforceable, it is only for the 85 cents.

For this are cited a number of cases, the first being *Morris v. Tharle*, 24 O.R. 159, which is supposed to lay down the proposition that, in the absence of a convenient arrangement, each parcel of goods supplied must be taken by itself. A perusal of the judgment of the Chancellor, especially on p. 164, will shew that no such principle was laid down.

The Manitoba case of *Chadwick v. Hunter*, 1 Man. R. 39, considered the Act Con. Stat. Man. 1880, ch. 53, sec. 5, as amended by 44 Vict. ch. 11, sec. 65, which provided that a claim for lien for materials furnished should be filed within five days. Materials amounting to \$375 had been supplied from time to time between the 1st May and the 7th July, and less than \$20 between the 7th July and the 25th August. The claim for a lien was filed on the

31st August. On the 7th July, 1883, came in force the Act 46 & 47 Vict. (Man.) ch. 32, which, by sec. 6, extended the time to 30 days, and, by sec. 1, limited the application of the Act to claims not less than \$20. Taylor, J., held that, as the amount furnished since the Act of 1883 was less than \$20; as to these supplies no lien attached unless they were connected with the former supplies, and that they were not, but that "each day's supplies was a complete transaction in itself." Then as to the goods supplied before the Act came in force the claim was not filed within five days. He accordingly dismissed the bill.

It is not necessary to express an opinion on the soundness of this decision—we do not know all the facts—but, if it were a case in all respects like the present, I should say that I prefer the reasoning of the Chancellor in *Morris v. Tharle*, 24 O.R. at p. 164, and that of the English cases—*Ex p. Aykroyd* (1847), 1 Ex. 479; *Wood v. Perry* (1849), 3 Ex. 442; *Bonsey v. Wordsworth* (1856), 18 C.B. 325.

The change made in our statute in 1896 has rendered former cases wholly inapplicable. Now the claim of lien is not to be filed as provided by R.S.O. 1887, ch. 126, sec. 21, "within 30 days from the completion thereof" (i.e., of the work) "or from the supplying or placing of the machinery;" but a new provision is made (59 Vict. ch. 35, sec. 21(2), R.S.O. 1914, ch. 140, sec. 22 (2)): "A claim for lien for material may be registered . . . within 30 days after the furnishing or placing of the last material so furnished or placed:" *Barrington v. Martin*, 16 O.L.R. 635, at p. 638. Thus it becomes wholly immaterial whether the material is furnished under but one contract or under fifty; and it will be seen that this is independent of the completion of the work. Most of the difficulty in this case arises from not considering the language of the statutes.

Appeal dismissed with costs.

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SOPER V. CITY OF WINDSOR.

July 6.
Nov. 30.

Limitation of Actions—Possession of Land—Limitations Act—Purchase by Owner at Tax Sale—Tax Deed—New Commencement of Title, Free from Previous Possession—Subsequent Possession—Evidence—Starting-point for Possession after Sale—Land Acquired by Municipality for Public Purpose—Assessment Act, R.S.O. 1914, ch. 195, secs. 94, 171.

P. bought the land in question, now in the city of W., at a tax sale on the 21st December, 1900, and received a statutory deed dated the 15th January, 1902. P. had previously owned the land, but, there being a defect in the registered title, he intentionally allowed the taxes to become in arrear, and bought at the sale had for the purpose of realising the arrears. The plaintiffs claimed to have acquired a statutory title by uninterrupted possession adverse to P. for a period long before the tax sale, until disturbed in 1914 by the defendants, the city corporation, who had bought from P., for a special public purpose, in 1910:—

Held, that P. had a right to purchase as he did; there is no objection to the prior owner of the land buying it at a tax sale resulting from his own failure to pay the taxes.

Stewart v. Taggart (1872), 22 U.C.C.P. 284, approved.

Review of American authorities.

2. That any possession which the plaintiffs had before the tax deed could not run in their favour: the deed created a new commencement of title, freed from any such possession: sec. 149 of the Assessment Act, R.S.O. 1897, ch. 224 (now sec. 94 of R.S.O. 1914, ch. 195).

Tomlinson v. Hill (1855), 5 Gr. 231, approved and applied.

3. That, upon the evidence, the plaintiffs had not shewn sufficient possession since the tax deed to support their claim under the Limitations Act.

The point that no estate could be acquired in the land by virtue of the statute, because it was bought by the defendants under a special statute for a special public purpose, was not considered.

Per RIDDELL, J.:—The time began to run in favour of the plaintiffs, not from the day of the “knocking down” to P., but from the day on which he became entitled to his deed under sec. 171 of the Assessment Act, R.S.O. 1914, ch. 195, *i.e.*, in December, 1901.

Judgment of LENNOX, J., reversed.

ACTION for a declaration of the plaintiff’s title to certain land in the city of Windsor, and for an injunction and damages in respect of the defendants’ entries and trespasses thereon, the defendants setting up a title under a sale for taxes and a conveyance to them.

May 29. The action was tried by LENNOX, J., without a jury, at Sandwich.

D. L. McCarthy, K.C., and *A. H. Foster*, for the plaintiffs.

J. H. Rodd, for the defendants.

July 6. LENNOX, J.:—The action was brought by Abram S. Soper. I added his wife as a party plaintiff. I do not know that this was necessary, as, upon the terms upon which the plaintiffs were living, I think the possession might well be attributed to the husband.

The plaintiffs have established “open, obvious, exclusive, and continuous” possession of the land in question, of the character required to defeat the defendants’ claim under the Limitations Act, R.S.O. 1914, ch. 75, for a period of twenty-five years or more; and, subject to the trespasses of the defendants in this action complained of, this has been continued down to the time of the issue of the writ. It is true that like the rear part of the land they acquired by deed, and as is true of the back portion of nearly every city lot, the plaintiffs were not able to make any actual use of the land in winter time, but it was fenced in, and was resting, mellowing, and renewing its life for the plaintiffs from winter to winter, it was never abandoned by the plaintiffs, it was ploughed and cultivated and cropped or pastured from year to year, the fences were renewed, repaired, and kept up from time to time in the ordinary way of ownership, “everything was done upon the land that an owner not residing upon it would do in reaping the full benefit of it,” and but for the opinion expressed in *Coffin v. North American Land Co.* (1891), 21 O.R. 80, now overruled, I should not have thought that it was reasonably open to argument that a distinction could be drawn between the winter and the summer months. The point is set at rest at all events in favour of the plaintiffs by the Court of Appeal in *Piper v. Stevenson* (1913), 28 O.L.R. 379.

This point being settled, it is not disputed that the possession of the plaintiffs from the time they enclosed the land, about 1888, until Mrs. Brown intervened, was visible, notorious, adverse, continuous, and unchallenged; and, with the land constantly fenced in and cropped or pastured, and used and enjoyed by the plaintiffs as ostensible owners, there was to the registered owner, as there was, upon the evidence, to everybody living in the neighbourhood, “the plainest evidence of wrongful possession . . . calling for action on the owner’s part if he desired to save his rights,” as was pointed out by Meredith, C.J.C.P., in the *Piper* case.

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The defendants set up ownership of the property by registered title; but, in considering what inferences should be drawn or presumptions raised in their favour, it is worth while to keep in mind that they are not registered owners by a chain of title from the Crown, there is no link uniting them with "the true owner" whom the plaintiffs dispossessed, and they have never been in possession, nor has any person under whom they claim been in possession at any time, except in so far as the defendants may be said to derive title through the plaintiffs. And the defendants have the plaintiffs' title or they have nothing. It was the plaintiffs' title, not the title traceable back to the Crown, that the defendants' grantor bought at the tax sale on the 21st December, 1900; for, whatever the contention may be as to the character of the occupation after 1906, it is not denied that from about 1888 down to the time of the tax sale in December, 1900, the true owner was absolutely shut out, and the plaintiffs were in undisputed enjoyment and possession of the land in question. Whether they paid the taxes or not is immaterial.

In *Iredale v. Loudon* (1908), 40 S.C.R. 313, the occupant of a room for the statutory period acquired title to it, although he not only failed to pay the taxes, but from time to time as they were delivered sent on the tax bills to the true owners, thus, as might be said, recognising the ownership of the parties claiming by deed.

The legal result is, that at the end of the first ten years of this possessory period, and probably two years before the date of the tax sale, the title of the true owner was extinguished by sec. 16 of the Limitations Act, and under sec. 5, sub-sec. 3 of sec. 6, and sec. 16 of this Act, the plaintiffs became, if not to all intents and purposes, at all events for all practical purposes, the owners; and, upon the authority of many cases, and, as I think, according to the correct interpretation of the statute, although there are cases to the contrary, they obtained a statutory conveyance of the land in question. This latter point is not perhaps very material, except in view of the plaintiffs' claim for a declaration of title; but some authorities will be found collected in Halsbury's Laws of England, vol. 19, p. 155—notes to para. 316.

The plaintiffs would be entitled to redeem: sec. 170 of the Assessment Act, R.S.O. 1914, ch. 195. They could maintain an action for trespass: *Bentley v. Peppard* (1903), 33 S.C.R. 444. They could, even while the time was running, dispose of the land by will, or deed, and it was inheritable by their heirs—that is their right, I presume: Halsbury's Laws of England, vol. 19, p. 158, para. 320. Their title, when the tax sale was made, was good at law and in equity, and could be forced upon a reluctant purchaser: *Scott v. Nixon* (1843), 3 Dr. & War. 388; *Lethbridge v. Kirkman* (1855), 25 L.J.N.S. Q.B. 89. Of course, like any other owners, their land was liable to be wrested from them by non-payment of taxes, followed by dispossession before they became reinstated by the purchaser's delay. The plaintiffs did not cease to be the owners by reason merely of the tax sale. The municipality did not profess to transfer the possession to the tax purchaser, and the deed, while conferring a fee simple estate, left it for the grantee to complete his title by obtaining possession. Has anything happened since to complete the defendants' title?

The plaintiffs remained in possession after the sale as before. The evidence of the plaintiffs and their witnesses is, to my mind, clear and satisfactory as to this, and is, I think, much more definite and reliable than the statements made by Mrs. Brown and members of her family. I am satisfied that the cattle were not pastured on the property until after Mrs. Brown had ceased to make payments, after she had, as Pulling swears, relinquished the property, and after Pulling, acting on this, had sold and conveyed to the defendants. The defendants cannot claim under Mrs. Brown, nor can she be regarded as in possession for them. What she did was adverse to the defendants. If she was not using the land, as Mrs. Soper swears, with the consent of the plaintiffs, she was a mere casual trespasser, and the plaintiffs are entitled to count Mrs. Brown's occupation, of whatever character it was, with their own, to complete the statutory period: *Doe dem. Goody v. Carter* (1847), 9 Q.B. 863; *Myers v. Rupert* (1904), 8 O.L.R. 668; *Kipp v. Synod of Toronto* (1873), 33 U.C.R. 220.

But, before the sale of the property to the defendants, and,

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as I presume, while the agreement between her and Pulling was current, Mrs. Brown did something, and at this time her acts, if sufficient in themselves, would enure to the benefit of Pulling and so of the defendants. A mere entry upon the land, however, in assertion of title, or even repeated entries, is not enough. There must be something done that "amounts to a resumption of possession by the true owner:" *Doe dem. Baker v. Coombes* (1850), 9 C.B. 714; *Randall v. Stevens* (1853), 2 E. & B. 641; *Allen v. England* (1862), 3 F. & F. 49; *Thorp v. Facey* (1866), 35 L.J.N.S.C.P. 349; *Worssam v. Vandenbrande* (1868), 17 W.R. 53; *Solling v. Broughton*, [1893] A.C. 556 (P.C.)

Mrs. Brown put up two or three notices of some kind somewhere upon or near the land in question, they were promptly removed by the plaintiffs, and she then relapsed into quiescence. This is clearly not enough to arrest the operation of the statute. The statute is specific in stating that no mere "entry or continual claim" will preserve the right of action. And there is nothing else. Pulling, the tax purchaser, says he did nothing whatever, and he could not controvert the statements of the plaintiffs and their witnesses. Breaks in the possession are not fatal so long as the true owner does not in consequence resume possession: *McLaren v. Morphy* (1860), 19 U.C.R. 609.

Mr. Rodd refers to *McMahon v. Grand Trunk R.W. Co.* (1908), 12 O.W.R. 324, and contends that, as the plaintiffs' rights must still depend upon the fiction of a lost grant, they could not acquire title, as the defendants have only power to convey for specific purposes which can have no application here.

Leaving out of the question the obvious circumstance that our statute aims at the "extinguishment" rather than the creation of a title, the answer is plain enough, namely: that there is no question of a grant here from the defendants; they would not, in any event, be the grantors, for they did not acquire title until 1910—it is not a question of what they are presumed to have conveyed away, but what title they obtained, and what they have done to preserve and perfect it.

I have no doubt at all that the plaintiffs have acquired a title to possession and enjoyment as against the original owners and

the defendants, but they ask for a declaration of title, an injunction, and damages. The state of the title at the time the adverse possession began has been shewn. The parties ousted were owners in fee. The conveyance at the tax sale was of a fee. There are, therefore, no outstanding estates in remainder to vest at a later date.

In Halsbury's Laws of England, vol. 19, p. 155, para. 316, it is said: "The operation of the statute is merely negative; it extinguishes the right and title of the dispossessed owner and leaves the occupant with a title gained by the fact of possession and resting on the infirmity of the right of others to eject him." But he is clearly entitled to be protected against the aggression of others who seek to disturb him, including a former owner who has lost his title by laches. I have come to the conclusion, though not without some hesitation, that the plaintiffs are entitled to all the relief claimed.

There will be judgment declaring that the plaintiffs are owners in fee of the land in question, for an injunction restraining the defendants from entering upon or interfering with this land, a reference to the Local Master at Sandwich to ascertain and assess the damages sustained by the plaintiffs, and judgment thereon.

The plaintiffs will have the costs of the action and reference—stay of execution for 30 days.

References: *Lloyd v. Henderson* (1875), 25 U.C.C.P. 253; *Brooke v. Gibson* (1896), 27 O.R. 218; *McConaghy v. Denmark* (1880), 4 S.C.R. 609; *Sherren v. Pearson* (1887), 14 S.C.R. 581; *Nixon v. Walsh* (1911), 2 O.W.N. 1218; *Griffith v. Brown* (1880), 5 A.R. 303; *Rooney v. Petry* (1910), 22 O.L.R. 101; and *Donovan v. Herbert* (1884), 4 O.R. 635.

The defendants appealed from the judgment of LENNOX, J.

October 2 and November 6. The appeal was heard by MULOCK, C.J.Ex., CLUTE, SUTHERLAND, and RIDDELL, JJ.

J. H. Rodd and *F. D. Davis*, for the appellants. The evidence does not shew such continuous possession for the statutory period since the tax sale as would give the plaintiffs title. There were

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interruptions, such as the pasturing by Mrs. Brown in 1908, and the putting up of signs against trespassers: *Cowley v. Simpson* (1914), 31 O.L.R. 200; *Piper v. Stevenson*, 28 O.L.R. 379; *Nixon v. Walsh*, 2 O.W.N. 1218; *Rooney v. Petry*, 22 O.L.R. 101; *McIntyre v. Thompson* (1901), 1 O.L.R. 163; *Stovel v. Gregory* (1894), 21 A.R. 137; *Donovan v. Herbert*, 4 O.R. 635; *Griffith v. Brown*, 5 A.R. 303; *Worssam v. Vandenbrande*, 17 W.R. 53; *Solling v. Broughton*, [1893] A.C. 556; *Hartley v. Maycock* (1897), 28 O.R. 508. Any possessory title acquired before the 21st December, 1900, was extinguished by the tax deed which conveyed the fee to Pulling, and started a new title: *Tomlinson v. Hill* (1855), 5 Gr. 231; *Smith v. Midland R.W. Co.* (1883), 4 O.R. 494; sec. 94 of the Assessment Act, R.S.O. 1914, ch. 195. There was nothing to prevent Pulling buying this land at the tax sale: *Stewart v. Taggart* (1872), 22 U.C.C.P. 284. As the plaintiffs must depend upon the fiction of a lost grant, they could not acquire title; the defendants have power to convey for specific purposes only. The onus was upon the plaintiffs to shew that this land was no longer required by the defendants for the purposes for which they were entitled to acquire it, because up to that time the defendants could not sell it, and no right by prescription could be acquired against the defendants: *Nash v. Glover* (1876), 24 Gr. 219; *McMahon v. Grand Trunk R.W. Co.*, 12 O.W.R. 324; *Grand Trunk R.W. Co. v. Valliear* (1904), 7 O.L.R. 364; Am. & Eng. Encyc. of Law, 2nd ed., vol. 1, p. 878. The defendants bought the land in 1910, and up to that time the plaintiffs had not had ten years' possession. Taxes are a lien upon the land; a tax sale is to realise the lien; and the purchaser has a right to possession: sec. 10 of the Conveyancing and Law of Property Act, R.S.O. 1914, ch. 109. If the defendants fail, they ask a lien for improvements.

D. L. McCarthy, K.C., for the plaintiffs, respondents. The evidence shews that the plaintiffs had continuous possession from 1888 to 1914, and so acquired title. As to the contention that the tax sale extinguished the plaintiffs' title, I submit that sec. 189 of the Assessment Act, R.S.O. 1914, ch. 195, is an answer. Neither the defendants nor those through they claim were in occupation at the time of the tax sale. So the plaintiffs' right

was not affected by that sale. If the plaintiffs did lose their prescriptive right in 1902, they acquired another possessory title subsequently, as the evidence shews. The plaintiffs' possession was not interrupted by any of the acts relied upon by the defendants; nor was it interrupted by the giving of the deed to the defendants in 1910. It was only interrupted when the defendants took possession in 1914, and previous to that time the plaintiffs had acquired a possessory title: *Nattress v. Goodchild* (1914), 6 O.W.N. 156; *Cowley v. Simpson*, *supra*. The person claiming under a tax deed must shew its validity: *Essery v. Bell* (1909), 18 O.L.R. 76; *McConnell v. Beatty*, [1908] A.C. 82. As to the contention that the plaintiffs could not acquire title by prescription against the defendants, because the latter have power to convey for specific purposes only, I submit that the statute is not thus prevented from running: *Bobbett v. South Eastern R.W. Co.* (1882), 9 Q.B.D. 424; *Mulliner v. Midland R.W. Co.* (1879), 11 Ch. D. 611; *Canadian Pacific R.W. Co. v. Guthrie* (1901), 31 S.C.R. 155; *Great Western R.W. Co. v. Talbot*, [1902] 2 Ch. 759; the Municipal Act, R.S.O. 1914, ch. 192, sec. 322; *Armour on Titles*, 3rd ed., p. 300.

Rodd, in reply. Section 189 of the Assessment Act, has no application, as it relates only to the nine preceding sections, which have nothing to do with this case.

November 30. CLUTE, J.:—The plaintiffs claim the land in question by possession for a period exceeding twelve years prior to the 23rd April, 1914, and state that during the whole of said period the lands have been enclosed with other lands belonging to the plaintiffs, by a fence erected by the plaintiffs; that on the 23rd April, 1914, the defendants broke down the plaintiffs' fence and otherwise committed trespass; and the plaintiffs claim damages and an injunction.

The defence states that on the 25th May, 1910, the defendants purchased from one Pulling the lands in question; that Pulling purchased the said lands on the 15th January, 1902, and remained in continuous possession down to the time of the defendants' purchase; and further claims that any acts of ownership over the lands by the plaintiffs were by the leave and license of

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the said Pulling and the defendants, and denies that the plaintiffs have acquired any title or interest by their alleged occupation of the lands.

It appears from the evidence that Pulling bought the lands at a tax sale on the 21st December, 1900, and received a statutory deed, dated the 15th January, 1902. Pulling had previously owned the land, but, owing to some defect in the registered title by reason of a mortgage not being discharged, which had in fact been paid off, and the difficulty of obtaining such discharge, he allowed the lands to run in arrear for the taxes, with a view of clearing the title. It is claimed that the effect of this act upon his part, in buying in his own lands, was, that the tax deed was not effective to give a new start to his title as against possession. The plaintiffs claim that they have been in possession a sufficient length of time since the tax deed to give them title.

It has long been held in our own Courts that there is no objection to the prior owner of the land buying it at a tax sale: *Stewart v. Taggart*, 22 U.C.C.P. 284. This view of the law has been followed in numberless cases and ought not now to be disturbed. Pulling, I think, had a right to purchase as he did.

The land itself is charged with the taxes, for which there is a special lien on such land, which has preference over all other claims except of the Crown: the Assessment Act, R.S.O. 1897, ch. 224, sec. 149 (now R.S.O. 1914, ch. 195, sec. 94). As was said by the Chancellor in *Tomlinson v. Hill*, 5 Gr. 231: "It follows that a conveyance . . . in pursuance of a sale for arrears of taxes operates as an extinguishment of every claim upon the land and confers a perfect title." In my opinion, any possession by the plaintiffs prior to the tax title deed cannot run in their favour; the deed creates a new commencement of title, freed from any such possession.

It remains, therefore, to consider whether the plaintiffs shew sufficient possession subsequent to the title deed.

As to this the son of the plaintiffs, after stating that the property had been fenced, gave evidence as follows:—

"Q. Has the fencing ever been removed on the side where the house is? A. Not until about two years ago, when the city

bought the property adjoining ours on the west for factory purposes. When they moved the buildings out, they tore the fence down.

“Q. Has that fence been replaced? A. No.

“Q. Are the posts there? A. They took the posts.”

And he states that since that time he pastured the property and kept the weeds out, that is, two years ago. The trial took place on the 29th May, 1914.

On cross-examination he says:—

“Q. Can you tell me about what time in the year the fence was removed? A. I cannot, I was not here.

“Q. When you came back the fence was gone? A. Yes.

“Q. When had you been home before that? A. About—I think it was three summers ago this summer, I went to Indianapolis.

“Q. How long have you been home? A. I came back a year ago this last spring.

“Q. You came back in 1912? A. Yes.”

When he went there, the fence was up; he went in October, 1910.

“Q. So you went in October, 1910? A. Yes.

“Q. And the fence was gone when you came back? A. Yes.

“Q. That is about all you know of the removal of the fence? A. Yes.”

This witness fixes the time when the fence was removed in this way: he says: “I went in October; I was away more than a year; I came back a year from the following February;” that is, he returned in February, 1912, and the fence was gone when he came back.

Pulling states in his evidence that after the tax deed of 1902 the property remained idle for a number of years until he made an agreement for sale to one Azaline Brown; this was about six or eight years ago. She made two small payments on the property, and then relinquished her claim. She held it for two or three years. He states that he never heard of any intimation of Soper claiming the property; that he had no knowledge that he made such claim; but, on the contrary, Soper tried to purchase it from Pulling on several occasions within the last ten years.

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George Cheyne, tax collector since 1886 for the city of Windsor, states that the property has been assessed to Pulling. He traced it back to 1904, and the taxes were paid by Pulling up to the time he sold and by the Corporation of the City of Windsor since.

Azaline Brown states that she lived near this property for 30 years; that she purchased it from Mr. Pulling about 1906 for \$300; that it was arranged that Pulling would send a man and mark the stakes with "B," which she found there. She paid \$15 at least, she says. She put up a sign upon the property, "No Trespassing," after she purchased it. She put up this sign four times altogether. As to fencing, she says that there were a number of posts and wire here and there. In some cases it was cut at the top, and in other cases both wires, and in other cases the bottom wire: "So I would not call it a fence, that is why I put up the sign."

"Q. How many strands of wire? A. Two."

She further states that she pastured on the lot a couple of cows for two seasons, tethered with a chain and stake. This was a little while after she made the deal, in 1910 or 1911.

If the witness is correct in her date of sale and her length of possession under the purchase, then the time of pasturing the cows would be after she had given it up. She says that she pastured them from November, 1910, until it was time to put them in, and in the spring of 1911 she again put them out to pasture. She did not keep them on the one lot all the time, but that was their home. She remembers a man by the name of Bell being engaged in ploughing on the property; and, having heard that he was ploughing the property that she had bought from Pulling, she went to see him and told him not to interfere with her possession; that she did not want it ploughed. He stated that he had orders to plough it. She said, "Well, you have orders not to plough it," and he stopped ploughing. The agreement which she had was burned. She says that she was never dispossessed by Mr. Pulling; that she moved out of the town and dropped payments. She could not state the exact date, about 1906.

Charles Brown, a son of the last witness, stated that the pasturing was in 1910 and 1911.

Joc Bell, the witness referred to by Mrs. Brown, states that he rented lands belonging to the Sopers on the east and west sides of the street; that:—

“When I got the east side ploughed I come to the west side and started to plough, and it was getting late in the evening, and I run two or three furrows, and in going home in the evening, on the corner of Giles and Goyeau, I met Mrs. Brown, and she said to me, she says, ‘Do you know you were trespassing over there?’ I said, ‘No, how am I trespassing?’ She says, ‘On that piece of property there.’ I says, ‘I don’t know anything about that.’ She says, ‘I know,’ and she says, ‘I forbid you ploughing.’ I said, ‘I rented that from Mrs. Soper, and if there is any grievance you will have to settle with Mrs. Soper.’ So it went on until the next day, and I went back and saw some signs up along the fence.

“Q. What was on the signs? A. ‘No Trespassing.’ I goes over to Mrs. Soper, and I tells her about the grievance, and she says to me, ‘Well, you go on and plough,’ but she says, ‘There is a little piece in there that is on the west side of Mersea street,’ that she said there was some man down town claimed he owned, and she told me who the man were, but I can’t remember, and she says, ‘A little further up Mr. McLean claims he owns a couple of lots in there,’ and she says, ‘He has never bothered anything at all about it,’ and she says, ‘You had better not plough this,’ and she says ‘until I see the man.’ I says, ‘When you go down town, you see the man and see what he wants for that strip.’ I wanted to plough clean through; and she went down in a day or two, and when she come back she said he wanted \$8.50 for it, and I said, ‘No, I won’t bother,’ so I left a strip from Giles avenue coming this way, . . . a space I suppose 150 or 160 feet. . . .

“Q. Did you plough on both sides of that strip? A. Yes, and left that without being ploughed.

“Q. What piece did Mrs. Brown refer to? A. Mrs. Brown told me, if my memory serves me right, she said, ‘I own from

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the bush through to Giles avenue.' That included the whole strip, because I were going clean through, and when I came back to plough, there was two or three signs up on the fence.

"Q. Did Mrs. Soper say anything about the signs and ask who put them there? A. She said—I don't know—she said, 'May be Mrs. Brown put them there or some one,' she said."

Mrs. Soper was recalled, and said that she knew about Mrs. Brown pasturing her cows: "I knew that she had her cows there, and we were not making any use of the land, and I told her boys they could use it." Asked about going down to see some man, she said: "I cannot remember that; if Mr. Bell remembers that, he remembers better than me." The further evidence as to possession given by Mrs. Soper is of the most general character.

I think that the evidence wholly fails to shew possession by the plaintiffs for ten years subsequent to the tax deed.

In the view I take, it is unnecessary to consider whether the possession could run against the defendants, who held the land in question in trust under a statute for public use.

The appeal should be allowed, and the plaintiffs' action be dismissed with costs.

MULOCK, C.J.Ex., and SUTHERLAND, J., agreed.

RIDDELL, J.:—The case of the plaintiffs is that, one Pulling being the owner of the land in question, they (the plaintiffs) took possession of it in 1888, and continued in possession until 1914, when their possession was disturbed by the defendants, the Corporation of the City of Windsor.

It appears that Pulling was assessed for this land, but, for reasons unconnected with the plaintiffs' alleged possession, he allowed the taxes to go in arrear; that he bought it at a tax sale on the 21st December, 1900, and received a statutory deed on the 15th January, 1902.

The plaintiffs claim that this transaction was wholly nugatory to affect their title by the Statute of Limitations, whether it was only inchoate at the time or complete; and the case may turn on the validity of that contention.

The right of an owner of land to buy at a tax sale, which was the result of his failing to pay the taxes thereon, has received a great deal of attention in the Courts of various States of the Union. In most of the States it is laid down somewhat in this way: "Any person who owes a positive duty to the State to pay the taxes on a particular tract of land cannot become a purchaser at a sale of the property for such taxes; or, if he does in form buy at such sale, he does not thereby acquire any right or title to the property better or stronger than what he had before, but his purchase is deemed merely a mode of paying the taxes, and leaves the title in precisely the position it would have occupied if the payment had been made before, instead of after, the land was put up for sale." Black on Tax Titles, 2nd ed., para. 273.

This is the law as declared in nearly twenty of the United States. A reference to the decisions will be found in the footnote to the paragraph just quoted. Accordingly, the Pennsylvania Court has held that "an attempt to better one's title to land by procuring a tax title cannot injure an inchoate right which one may have previously acquired under the Statute of Limitations:" *Bannon v. Brandon* (1859), 34 Pa. St. 263. And, a few years before, the same Court, in *Owens v. Myers* (1852), 20 Pa. St. 134, held that the purchase at a tax sale by the owner does not divest a title already complete by the Statute of Limitations. The doctrine seems to be rested upon two principles: (1) that the sale is not a real sale but a mere roundabout way of the person paying the taxes who should have paid them before; and (2) that the pretended purchaser should not be allowed to take advantage of his own wrong.

It seems to me, with much respect, that the Courts have misinterpreted the transaction. At a tax sale any one is entitled to bid, and the owner is not picked out as the purchaser; he may pay less or more than the taxes, and what he pays, he pays not as taxes, but as purchase-money.

Nor can the doctrine that no one may take advantage of his own wrong be applied. Any wrong which the owner commits, he commits against the municipality which is entitled to the taxes. He certainly owes no duty to pay the taxes *quoad* a trespasser

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who has obtained or is obtaining a title to his land by a statute of limitations. If the municipality sees fit to waive the wrong and obtain its money by another process than suing, who is injured? Surely the municipality may do so, and full effect given to its rights. Moreover, preventing the owner from buying would prevent the municipality from making a satisfactory sale, in many instances.

Certain of the Courts do not approve of the doctrine. For example, in Minnesota, the Court in *Branham v. Bezanson* (1885), 33 Minn. 49, 21 N.W. Repr. 861, at p. 862, say: "Under the tax laws, one already the owner of real estate may become the purchaser at tax sale, and he may afterwards rely on his antecedent title or on the tax title or on both."

In our own Courts, in the case of *Stewart v. Taggart*, 22 U.C.C.P. 284, it was said tersely, at p. 290: "We see nothing in the objection that the plaintiff could not purchase, having been assessed for the land."

Even had we doubts of the correctness of this decision (and, speaking for myself, I have none), we should affirm it, although of course we are not bound by it. The decision has been considered law for more than forty years, and hundred of titles depend upon such purchases. The principle *communis error facit jus* may well be applied, which is "peculiarly applicable to conveyancing questions:" *Caldwell v. McLaren* (1884), 9 App. Cas. 392, at p. 409.

"Where a decision of the Courts, originally wrong, or an erroneous conception of the law, especially of real property, has been made, for a length of time, the basis upon which rights have been regulated . . . the maxim . . . may be applied:" Broom's Legal Maxims, 7th ed., p. 114; and see the doctrine discussed and illustrated at pp. 112-115.

But, even where the rule as to the right of one assessed to buy at a tax sale is different, there seems to be an exception made where the title of the person taxed is or seems to be defective, and the sale is adopted as a means of healing the defective title.

In *Coxe v. Gibson* (1856), 27 Pa. St. 160, a "suspicious title"

had been acquired; the purchaser allowed the land to be sold at a tax sale, and bought it in. The Court held that "there is nothing in reason or law to prevent a man who holds a defective title from purchasing a better at a treasurer's sale for taxes. It is a very common remedy for defective title" (p. 165).

In the present case Pulling had a "suspicious title," and there was, I think, nothing to prevent him from "purchasing a better at a treasurer's sale for taxes;" and in Ontario no less than in Pennsylvania this "is a very common remedy for defective titles."

The plaintiffs claim that they had a title to the land by the Statute of Limitations before the sale, and that their right was not affected by the sale.

The statute now in force, the Assessment Act, R.S.O. 1914, ch. 195, sec. 94, is substantially (in respect of matters material here) the same as that from the earliest time; the well-known Act of 1853, 16 Vict. ch. 182, by sec. 45 providing that "the taxes accrued or to accrue on any land shall be a special lien on such land, having preference over any claim, lien, privilege or incumbrances of any party except the Crown . . . ;" C.S. U.C. ch. 55, sec. 107; R.S.O. 1877, ch. 180, sec. 105; R.S.O. 1887, ch. 193, sec. 137.

The former section, 16 Vict. ch. 182, sec. 45, was considered by Blake, C., in *Tomlinson v. Hill*, 5 Gr. 231. Property had been sold for taxes by the Sheriff (as was then and for some time thereafter the practice), in the lifetime of the owner. After his death, the widow filed a bill for dower. The Chancellor dismissed the suit, saying: "The land tax is made a charge upon the property itself, to the payment of which all persons having any interest in the land are bound to look; and it follows that a conveyance by the Sheriff in pursuance of a sale for arrears of taxes operates as an extinguishment of every claim upon the land and confers a perfect title under the Act of Parliament." While this is a decision on a claim of dower which was claimed under the owner and not by adverse title, I cannot see that the same reasoning will not bar any one who claims to have had any interest whatever in the land; and, unless we are to wrest the Act, that must be the effect.

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In the States in which the taxes are made a lien on the land as in our Province, and not on the interest of the person assessed, it has uniformly been held that the fee in the land passes, and not simply the interest of the taxpayer: *Black on Tax Titles*, paras. 419 *sqq.*: "The land itself is sold for taxes, and not the particular interest or title of the person to whom it was assessed" (p. 529, para. 420).

And the interpretation now put on the statute is strengthened by the provisions of the Act, secs. 154, 157, for sale of less than the fee simple, and sec. 163, for the form of the deed to accord with "the nature of the estate or interest sold."

It remains to consider the effect of the sections of the Act which, it is contended, prevent that effect—secs. 180 and 189.

The former section, 180, simply provides that no one not in possession of land sold at a tax sale may make a valid conveyance of his right of entry, etc., notwithstanding the provisions of the Conveyancing and Law of Property Act, R.S.O. 1914, ch. 109, sec. 10, and that, so far as such an attempted conveyance is concerned, the common law and the statute 32 Hen. VIII. ch. 9, are made to apply.

Of course, at the common law, if a man had only the right of either possession or property, he could not convey it to any other, the reason given being that this was to prevent pretended titles being granted "to great men, whereby justice might be trodden down and the weak oppressed:" Co. Litt. 214; Blackstone, Book II., 290; although it is much more likely that great men were by this principle quieted in the possession of lands wrongfully taken than that they were prevented from obtaining lands to which they might buy a right. *Beati possidentes* was the reproach as well as the glory of the common law. The statute 32 Hen. VIII. ch. 9 is in affirmance of the common law (Plowden, 88), and enacts that no one should buy or sell or by any means obtain any right or title to any lands, etc., unless the person contracting to sell, or his ancestor or he under whom these claim, had been in possession of the same for a year before the contract.

This statute was in substance repealed in England, and the

common law changed by 8 & 9 Vict. ch. 106, and in Upper Canada by 14 & 15 Vict. ch. 7, sec. 5; and our present statute, R.S.O. 1914, ch. 109, sec. 10, is practically the same as the original. The chain is: 14 & 15 Vict. ch. 7, sec. 5; C.S.U.C. ch. 90, sec. 5; R.S.O. 1877, ch. 98, sec. 5; R.S.O. 1887, ch. 100, sec. 9; R.S.O. 1897, ch. 119, sec. 8; 1 Geo. V. ch. 25, sec. 10; R.S.O. 1914, ch. 109, sec. 10. But the common law and the old statute are made applicable to land which has been sold for taxes.

The history of sec. 189 goes back to 1869, thus: R.S.O. 1914, ch. 195, sec. 189; 4 Edw. VII. ch. 23, sec. 184; R.S.O. 1897, ch. 224, sec. 220; 55 Vict. ch. 48, sec. 200; R.S.O. 1887, ch. 193, sec. 200; R.S.O. 1877, ch. 180, sec. 169; 33 Vict. ch. 23, sec. 7. But there is no need of investigating the history in order to interpret its meaning.

Only the next preceding nine sections are referred to, i.e., secs. 179-188 inclusive.

Section 179 refers to a valid sale, with the conveyance made after the statute under the authority of which the sale was made is repealed.

Section 180 we have already discussed.

Section 181, land sold for taxes and the sale held to be invalid.

Sections 182, 183, 184, and 185, are conditioned on sec. 181.

Section 186, an action in which the defendant notifies the plaintiff of the amount on receipt of which he will surrender possession.

Section 187, a tax sale invalid.

Section 188 refers to contracts of purchase, lease, etc., between tax purchaser and original owner.

It will be seen that not one of these nine sections has any application to the present case; consequently sec. 189 may be wholly disregarded.

The result then is, that the fee simple passed to Pulling by the sale, and the plaintiffs to succeed must shew that they have acquired title since that sale. The time from which the Statute of Limitations is to run in favour of the plaintiffs is not the day of the "knocking down" to Pulling, but the earliest time at

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which he became entitled to his deed under sec. 171,* i.e., in December, 1901: *Smith v. Midland R.W. Co.*, 4 O.R. 494, at pp. 495-499; as the deed is in law the "sale:" *Donovan v. Hogan* (1887), 15 A.R. 432, and cases cited.

It is incumbent, therefore, upon the plaintiffs to prove ten years continuous possession from or after December, 1901, and in that, I think they fail. In 1906-7 the holder of the paper title took possession of the land in question and excluded the plaintiffs, thereby putting an end to the running of the statute.

In the view I take of the facts, it is not necessary to pass upon the very curious point that no estate can be acquired in the land by the statute by reason of the fact that it was bought under a special statute for a special public purpose: *Grand Trunk R.W. Co. v. Valliear*, 7 O.L.R. 364; *McMahon v. Grand Trunk R.W. Co.*, 12 O.W.R. 324.

The argument based on *Essery v. Bell*, 18 O.L.R. 76, is completely met by the statute, R.S.O. 1897, ch. 224, sec. 209—R.S.O. 1914, ch. 195, sec. 178.

I am of opinion that the appeal must be allowed with costs and the action dismissed with costs.

Judgment accordingly.

[APPELLATE DIVISION.]

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 Nov. 30.

WOOD V. TROMANHAUSER.

Limitation of Actions—Promissory Note—Acknowledgment in Writing.

To an action begun on the 5th November, 1912, to recover the amount of a promissory note made by the defendant and his brother, dated the 1st November, 1903, payable one year after date, the defendant pleaded the Limitations Act; and it was *held*, that a letter written by the defendant to the plaintiff, dated the 8th November, 1906, in which the defendant said: "I thought that note matter was settled long ago. I will write my brother John for details, and on receipt of his reply you will hear from me again"—assuming that the letter referred to the note—was not a written acknowledgment of the debt from which a promise to pay might be inferred.

Judgment of COATSWORTH, JUD.C.O.C.J., York, reversed.

*This refers to sec. 171 of R.S.O. 1914, ch. 195. See sec. 201 of R.S.O. 1897, ch. 224.

APPEAL by the defendant from the judgment of one of the Junior Judges of the County Court of the County of York (COATSWORTH), in favour of the plaintiff, in an action to recover \$310.13, the amount of a promissory note, made by the defendant and another, to the order of the plaintiff.

The note was dated the 1st November, 1903, and was payable one year after date. The action was begun on the 5th November, 1912. The defendant pleaded the Limitations Act; and the plaintiff relied on a certain letter of the 8th November, 1906, written by the defendant, as an acknowledgment of the debt sufficient to take the case out of the statute.

October 7. The appeal was heard by MULOCK, C.J.Ex., CLUTE, RIDDELL, and SUTHERLAND, JJ.

W. Proudfoot, K.C., for the appellant. The letter of the 8th November, 1906, contains no acknowledgment of indebtedness or promise to pay. The following cases and authorities were referred to: *British Whig Publishing Co. v. Harpell* (1914), 6 O.W.N. 694; *Lightwood's Time Limit on Actions*, p. 345, and cases there cited; *Dougall v. Executors of Cline* (1850), 6 U.C.R. 546; *Gemmell v. Colton* (1856), 6 U.C.C.P. 57; *McCormick v. Berczy* (1845), 1 U.C.R. 388; *Grantham v. Powell* (1850), 6 U.C.R. 494; *Young v. Moore* (1863), 23 U.C.R. 151; *Buckmaster v. Russell* (1861), 10 C.B.N.S. 745; *Poynder v. Bluck* (1837), 5 Dowl. 570; *Collinson v. Margesson* (1858), 27 L.J.N.S. Ex. 305; *Tanner v. Smart* (1827), 6 B. & C. 603; *Encyc. of Laws of England*, 2nd ed., p. 519; *Smith v. Thorne* (1852), 18 Q.B. 134; *Green v. Humphreys* (1884), 26 Ch. D. 474; *King v. Rogers* (1901), 1 O.L.R. 69, *per Osler, J.A.*, at p. 70. By reason of his long delay, the plaintiff is not entitled to have anything presumed in his favour, especially against a surety.

J. P. MacGregor, for the plaintiff, the respondent, relied on *McGuffie v. Burleigh* (1898), 14 Times L.R. 319, as an authority to shew that parol evidence may be given to connect different documents for the purpose of making out an acknowledgment sufficient to take the case out of the statute. Reference was also made in this connection to *Collis v. Stack* (1857), 1 H. & N. 605; *Langrish v. Watts*, [1903] 1 K.B. 636, 640, 642; *Morgan v. Row-*

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lands (1872), 26 L.T.R. 855; *Firth v. Slingsby* (1888), 58 L.T.R. 481, 485, *per* Stirling, J. Reference was also made to *Lee v. Wilmot* (1866), 14 L.T.R. 627, 628, *per* Channel, B.; *Prance v. Simpson* (1854), Kay 678; *Fisk v. Mitchell* (1871), 24 L.T.R. 272; *Brown v. Mackenzie*, [1913] W.N. 75; *Cooper v. Kendall*, [1909] 1 K.B. 405; Phipson on Evidence, 5th ed., p. 590, Rule 4; Lightwood, *op. cit.*, p. 341 *et seq.*; *Marshall v. Smith* (1870), 20 U.C.C.P. 356; *Shortrede v. Cheek* (1834), 1 A. & E. 57; *Hart v. Standard Marine Insurance Co.* (1889), 22 Q.B.D. 499; *In re River Steamer Co., Mitchell's Claim* (1871), L.R. 6 Ch. 822, 832, where *Prance v. Simpson*, *supra*, is cited with approval by Mellish, L.J. In *Tanner v. Smart*, *supra*, there was no acknowledgment of any original debt, which distinguishes that case, as well as the *Buckmaster* and *Poynder* cases from the case at bar in a vital point. It is submitted with confidence that the plaintiff is entitled to judgment, on the principles laid down in the *McGuffie*, *Brown*, and *Prance* cases. I also refer specially to the review of the cases in *Cooper v. Kendall*, *supra*.

November 30. MULOCK, C.J.Ex.:—Appeal from the judgment of His Honour Judge Coatsworth, Junior Judge of the County Court of the County of York, in favour of the plaintiff. This action is to recover from the appellant the sum of \$310.13, being the amount of a promissory note in the following words and figures:—

“\$310 $\frac{13}{100}$.”

Fonda, Iowa, Nov. 1st, 1903.

“One year or sooner after date we or either of us promise to pay to A. S. Wood or order, at Pocahontas County Bank of Fonda, Iowa, three hundred and ten and $\frac{13}{100}$ dollars, value received, with 8% interest until paid.

“J. B. Tromanhauser,

“J. H. Tromanhauser.”

The writ was issued on the 5th November, 1912. The appellant relies on the Statute of Limitations as a bar to the claim; and the sole question is, whether he has, within six years before action begun, made any written acknowledgment of the debt from which a promise to pay may be inferred: *Tanner v. Smart*, 6 B. & C. 603; *Green v. Humphreys*, 26 Ch. D. 474.

The respondent relies on the following letter written by the appellant to the respondent:—

“Goderich, Ont., Nov. 8, 1906.

“A. S. Wood, Esq., Cashier, Pocahontas County Bank,

“Fonda, Iowa.

“Dear Sir: Your letter of Oct. 27th sent to Minneapolis has been forwarded here, and only recently received.

“In reply would say that I thought that note matter was settled long ago. I will write my brother John for details, and on receipt of his reply you will hear from me again.

“Yours truly,

“J. H. Tromanhauser.”

The letter of the 27th October is not produced, but it may be assumed that it referred to the note in question. I am unable to discover in the letter of the appellant of the 8th November (a) any acknowledgment from which the law infers a promise to pay or (b) any acknowledgment from which the Court infers a promise to pay. On the contrary, its plain meaning is that there is no existing indebtedness.

Further, to say that “I thought that note matter was settled long ago” is not even an admission of an original indebtedness. An unfounded claim may be settled by its abandonment. The concluding part of the letter, that the appellant would write to his brother for details, and on receipt of his reply would write the respondent again, is simply a promise to write two letters. Nothing else can be read into the words.

The appeal should be allowed, with costs here and below.

CLUTE and SUTHERLAND, JJ., agreed.

RIDDELL, J.:—The defendant, one J. B. Tromanhauser, signed, with his brother J. H. Tromanhauser, on the 1st November, 1903, the following note:—

“\$310 $\frac{13}{100}$.

Fonda, Iowa, Nov. 1st, 1903.

“One year or sooner after date we or either of us promise to pay to A. S. Wood or order, at Pocahontas County Bank of Fonda, Iowa, three hundred and ten and $\frac{13}{100}$ dollars, value received, with 8% interest until paid.

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The plaintiff on the 5th November, 1912, brought this action in the County Court of the County of York, and the question arose whether the *primâ facie* bar by the Statute of Limitations was not removed by a certain letter written by the defendant. It would appear that the plaintiff had written for payment, whereupon the defendant wrote the following letter, which the plaintiff relies upon as avoiding the statute:—

“Goderich, Ont., Nov. 8, 1906.

“A. S. Wood, Esq., Cashier, Pocahontas County Bank,

“Fonda, Iowa.

“Dear Sir: Your letter of Oct. 27th sent to Minneapolis has been forwarded here, and only recently received.

“In reply would say that I thought that note matter was settled long ago. I will write my brother John for details, and on receipt of his reply you will hear from me again.

“Yours truly,

“J. H. Tromanhauser.”

The question whether the statutory bar had been avoided was ordered to be first tried, and the matter came on for adjudication before Judge Coatsworth. That learned Judge on the 12th May decided in favour of the plaintiff; and the defendant now appeals.

It has long been settled that to operate as an avoidance of the statutory bar an acknowledgment must be such as would lead the Court to infer a promise by the writer to pay: *Firth v. Slingsby*, 58 L.T.R. 481, 485; *Green v. Humphreys*, 26 Ch. D. 474 (C.A.) See the cases in Halsbury's Laws of England, vol. 19, p. 63, n. (h).

From an unconditional acknowledgment of liability, of course, a promise to pay may be inferred: *v. the same cases*.

But here there is no acknowledgment of liability, i.e., of existing liability. The writer, in so many words, states his view and belief that no liability exists: “I thought that note matter was settled long ago.” Nor is there any conditional promise to pay with a fulfilment of the condition, as in many cases; for example, *Humphreys v. Jones* (1845), 14 M. & W. 1. Many of the cases are collected in Halsbury, vol. 19, p. 64, n. (p). The only pro-

mise is to write to his brother, the real debtor, for particulars, and on receiving these to write again to the plaintiff. What he intended to do is wholly immaterial: the question is, "What did he say to the plaintiff in writing?"—not what he meant to do, but what the written word meant.

I cannot see that letters by others not connected with the defendant, or the examination for discovery of the defendant, made part of the case, assist in any way to interpret the perfectly plain written language of the defendant, in which I find nothing equivocal.

This judgment proceeds on the assumption that it has been legally proved that the letter refers to this note: *McGuffie v. Burleigh*, 14 Times L.R. 319. Were this not so, the plaintiff would have no ground even for argument.

The appeal, in my opinion, should be allowed with costs here and below.

The case does not seem to call for the citation of many authorities. Most will be found in Lightwood's Time Limit on Actions, p. 345; Sinclair's Division Courts Act; Halsbury's Laws of England, vol. 19, pp. 63 *sqq.*

Appeal allowed with costs.

[APPELLATE DIVISION.]

TURNER V. EAST.

Master and Servant—Injury to Servant—Negligence of Foreman of Master's Works—Dangerous Place—Findings of Jury—Absence of Finding as to Nature of Foreman's Negligence—Finding by Appellate Court on Evidence—Judicature Act, R.S.O. 1914, ch. 56, sec. 27 (2)—Workmen's Compensation for Injuries Act, R.S.O. 1914, ch. 146, sec. 3 (c)—Causa Causans of Injury—Absence of Contributory Negligence.

The plaintiff was injured by the walls of a ditch, in which he was working for the defendants, falling in upon him, and brought this action to recover damages for his injuries. The jury found (2) that the defendants were guilty of negligence causing the injury; (3) that "such negligence" consisted in "negligence on part of foreman;" (5) that the foreman was one whose orders the plaintiff was bound to obey; (6) that the plaintiff had orders from the foreman to work in the ditch; and (7) that the plaintiff himself was not guilty of any act of negligence which led to the accident:—

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Held, upon the evidence, that the foreman was guilty of negligence in sending the plaintiff to work at a place which was known to him to be dangerous; and that the appellate Court should, under sec. 27(2) of the Judicature Act, R.S.O. 1914, ch. 56, make the finding accordingly which the jury had failed to make, and so affirm the judgment for the plaintiff entered at the trial.

Under sec. 3(c) of the Workmen's Compensation for Injuries Act, R.S.O. 1914, ch. 146, the obedience of the workman to the orders of one to whose orders he is bound to conform need not be the *causa causans* of the injury. *Wild v. Waygood*, [1892] 1 Q.B. 783, followed. Judgment of the Judge of the District Court of the District of Rainy River affirmed.

THE plaintiff, a workman in the employ of the defendants, was injured by the walls of a trench falling in on him. He brought this action in the District Court of the District of Rainy River against his masters; and, after a trial before the District Court Judge and a jury, he obtained judgment for \$500 and costs. The defendants appealed.

The questions left to the jury and their answers were as follows:—

1. What was the cause of the injury to the plaintiff? A. By weight of earth falling on him.

2. Were the defendants guilty of negligence causing that injury? A. Yes.

3. If so, state in what such negligence consisted? A. Negligence on part of foreman.

4. If you find any defects in ways or appliances used, had the defendants or their foreman knowledge of the defect or should they have had knowledge? A. We believe they had.

5. Was foreman McLeod one whose orders the plaintiff was bound to obey? A. Yes.

6. Was the plaintiff at work in the ditch under the orders of foreman McLeod, or did he go there of his own accord and without orders? A. We believe he had orders.

7. Was the plaintiff himself guilty of any act of negligence which led to the accident? A. No.

8. If so, state in what such negligence consisted.

9. Assuming that the plaintiff is entitled to recover, what sum do you think fair for the defendants to pay? A. We believe the amount asked for reasonable—\$500.

October 15. The appeal was heard by MULOCK, C.J.Ex., CLUTE, RIDDELL, and LENNOX, JJ.

H. E. Rose, K.C., for the appellants, argued that there was nothing in the answers of the jury to shew in what the negligence of the foreman consisted, and so negligence was not established. He referred to *Armstrong v. Canada Atlantic R.W. Co.* (1902), 4 O.L.R. 560, and *Giovinazzo v. Canadian Pacific R.W. Co.* (1909), 19 O.L.R. 325. He also urged that the jury's finding was only that the plaintiff was in the ditch by order of the foreman, not that he was at the spot in the ditch where the accident happened, by such order.

Casey Wood, for the plaintiff, respondent, contended that negligence was sufficiently established by the answers; but that, in any event, the Court could itself supply any defect in that regard, under the provisions of the Judicature Act, R.S.O. 1914, ch. 56, sec. 27(2), without sending the case back for retrial: *Phillips v. Canada Cement Co.* (1914), 6 O.W.N. 185.

Rose, in reply.

November 30. The judgment of the Court was delivered by RIDDELL, J. (after setting out the facts as above):—There is nothing in the answers to shew in what the negligence of the foreman consisted; and the charge does not assist, it is of the most meagre and perhaps misleading kind. Possibly the matter had been so fully discussed in the addresses of counsel that the learned District Court Judge thought it unnecessary to charge at any length on the point. At all events what he said is as follows: "The third question, 'If so, state in what such negligence consisted?' depends on whether you find the defendants guilty of negligence or not."

In *Phillips v. Canada Cement Co.*, 6 O.W.N. 185, at p. 188, it is said: "If the answer of the jury is open to the objection . . . that it does not indicate wherein the negligence of the foreman consisted, the case is one in which we should exercise the powers conferred on us by the Judicature Act, and, instead of sending the case back for a new trial, find the facts which the jury have omitted to find." The same course was pursued in *Smith v. Northern Construction Co.* (1914), 30 O.L.R. 494, and in many other cases.

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The statute referred to is now R.S.O. 1914, ch. 56, sec. 27(2); the powers therein conferred upon the Court should be exercised whenever a clear case is made out.

Of the acts of negligence that might be and are complained of, there is only one which, in my view, is so clearly proved as to justify us in applying the statute; and, if that should fail, there should be a new trial.

A main contest at the trial was, whether the plaintiff was at the place where the accident happened by the order of his foreman, McLeod, or at his own wish. The jury have found that it was by the order of the foreman. The criticism by Mr. Rose that the finding is only that he was in the trench by such order cannot, in view of the course at the trial, and especially the finding as to want of contributory negligence, receive any countenance. The learned District Court Judge in his charge on contributory negligence says: " 'Was the plaintiff himself guilty of any act of negligence which led to the accident?' That is, if a man goes into a position where he has no business to be, a position which places him in danger, the law says he is guilty of contributory negligence." And the jury have given an answer in the negative.

There was no dispute as to the nature of the place, it was dangerous; but that is not enough. Workmen are daily and hourly sent into a place of danger without thereby imposing liability on the master; some places are necessarily dangerous, and yet workmen must go to and work in these very places. But the defendant himself says that on the morning of the accident he ordered two men (he says the plaintiff and another, but, in view of the jury's finding, he must be mistaken as to the plaintiff) out of that place, "told them to get out or I would fire them." "I thought it was'n't a fit place for a man to be if he could'n't see danger." McLeod says: "I . . . saw Mr. Turner . . . I called to him to jump out of there . . . because that was no place for a man." On that evidence, no jury would be allowed to find a verdict that it was not negligence of the grossest kind to send the plaintiff to work at this spot; and we should find the foreman negligent in this respect.

The Workmen's Compensation for Injuries Act, R.S.O. 1914, ch. 146, sec. 3(c), renders the master liable "where personal injury is caused to a workman by reason of . . . the negligence of any person in the service of the employer to whose orders or directions the workman at the time of the injury was bound to conform and did conform, where such injury resulted from his having so conformed." It will be seen that the Legislature wisely refrained from using the technical or quasi-technical terminology "where his having so conformed was the cause of the injury;" the looser and more comprehensive "by reason of" and "resulted" is employed. This enables the Court to avoid giving a technical interpretation to the sub-section, and to say that the obedience to the order need not be the *causa causans* of the accident. The difficulties arising from the distinction between *causa causans* and *causa sine quâ non* are illustrated in the recent case of *Wadsworth v. Canadian Railway Accident Insurance Co.* (1914), 49 S.C.R. 115 (28 O.L.R. 537 and 26 O.L.R. 55).

In *Wild v. Waygood*, [1892] 1 Q.B. 783, a workman was ordered by Duplea, his superior, upon a plank across the well of a lift, and another employee negligently started the lift, occasioning injury to the first. The master was held liable. Lord Herschell says (p. 788): "It is said that although the injury to the plaintiff may have arisen by reason of the negligence of Duplea, and although the plaintiff may have been bound to conform to the orders of Duplea, yet that the injury did not result from his having so conformed. In the present case there was obviously a most intimate connection between the conformity with the order, the negligence, and the injury, because the negligence was in starting the lift whilst the plaintiff was in the position which he had been ordered by Duplea to take up. If the plaintiff had not been on the plank there would have been no negligence in Duplea starting the lift; the negligence was in starting the lift while the man was upon the plank, and the man was upon the plank in conformity with an order which he was bound to obey. Therefore, it appears to me, as I have already said, that there was the most intimate connection between the two. But then it is said that the conformity to the orders of

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Duplea was not the *causa causans* of the injury—that the *causa causans* was the starting of the lift. I do not think, on the true construction of this sub-section, that it is necessary that conformity to the order should be the *causa causans* of the injury, because the provision is that the action may be brought where personal injury is caused by reason of the negligence. . . . Now, in this case it appears to me, and I do not propose to lay down any general rule upon the subject, that it is quite clear the injury did result from the plaintiff having conformed to an order when he was told to go to a place which was, and must have been known to be, a dangerous place if the person who told him to go there was guilty of negligence. That person having been guilty of negligence created the danger and caused the injury, it seems to me the case is within the very terms of the Act.”

This case has not been overruled or questioned, and I think it should be followed.

We should therefore find the specific negligence of the foreman as has been indicated, and dismiss the appeal with costs.

Appeal dismissed with costs.

[APPELLATE DIVISION.]

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SMITH v. GRAND TRUNK R.W. Co.

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Railway—Injury to Servant—Conductor of Freight Train—Negligence—Defective Ladder—Breach of Statutory Duty—Railway Act, R.S.C. 1906, ch. 37, sec. 264 (5)—Proximate Cause of Injury—Conductor's Disobedience of Company's Rules—Contributory Negligence—Findings of Fact of Trial Judge—Appeal.

The plaintiff was the conductor of a freight train of the defendants; when the train was leaving a station, the plaintiff, contrary to the defendants' rules, jumped on the train while it was in motion, and proceeded along the tops of the cars in order to reach the caboose; he then attempted to descend by a ladder attached to one of the cars. This ladder was in a defective condition; the defendants' inspector had turned up the stirrup at the bottom to indicate that it was not to be used; and the car was on its way to the repair-shop. The plaintiff was not told of the defect in the ladder, but he knew that the car was on its way to the repair-shop. When he stepped on the ladder, it gave way, and he fell and was injured. In an action for damages for his injuries, tried without a jury, the trial Judge found that the plaintiff's injuries were caused by the defective ladder; that it was a part of the equipment of the train; that the plaintiff's infraction of the rules in getting on the moving train was not the proximate cause of his injuries; and that the defendants had not established that the plaintiff was guilty of negligence without which the accident would not have happened:—

Held (RIDDELL, J., dissenting), that the findings of the trial Judge were warranted by the evidence; that there was a breach of a statutory duty on the part of the defendants in sending out the car with a defective ladder (Railway Act, R.S.C. 1906, ch. 37, sec. 264, sub-sec. 5); and that the breach was the proximate cause of the injuries sustained by the plaintiff.

Farcott v. Canadian Pacific R.W. Co. (1901-2), 8 B.C.R. 393, 32 S.C.R. 721, *Truman v. Rudolph* (1895), 22 A.R. 250, *Deyo v. Kingston and Pembroke R.W. Co.* (1904), 8 O.L.R. 588, *Grand Trunk R.W. Co. v. Birkett* (1904), 35 S.C.R. 296, and *Cook v. Grand Trunk R.W. Co.* (1914), 31 O.L.R. 183, distinguished.

Stone v. Canadian Pacific R.W. Co. (1913), 47 S.C.R. 634, followed.

Per RIDDELL, J.:—There is no such thing as negligence at large: actionable negligence is breach of a duty owed to the person complaining. The car was plainly a damaged article and so represented—not really part of the “plant,” but being taken as freight to the repair-shop. There was nothing in the plaintiff’s employment calling for him to run along the top of the cars to get to his caboose, and the defendants had no reason to suspect that he would do so. There was no negligence towards the plaintiff; and the statutory requirements as to ladders on cars have no reference to a car placed in a train to be taken to the repair-shop. Every necessary precaution was taken that the plaintiff should know, and he did know, all that was necessary about the car. The plaintiff was going to his proper place in the train by a way not contemplated by the defendants, and which was used only because he had already violated the law. In doing this he used a ladder which was out of commission, and its use forbidden by the bending up of the stirrup; and that was the direct and immediate cause of his injuries. The act of so using an appliance on a damaged car, without any examination, was contributory negligence.

Judgment of FALCONBRIDGE, C.J.K.B., affirmed.

APPEAL by the defendants from the judgment of FALCONBRIDGE, C.J.K.B., at the trial of the action without a jury, in favour of the plaintiff.

The plaintiff, the conductor of a freight train, was on the top of one of the cars and attempted to descend by a ladder attached to the car. When he stepped on the ladder, it gave way, and he was thrown to the ground and injured. He brought this action to recover damages for his injuries, alleging that the ladder was unsafe and defective, and that his injury was occasioned by its condition.

The trial Judge found that the plaintiff’s injuries were caused by the defective ladder, which was part of the equipment of the train; that the plaintiff’s infraction of the rules of the defendants, in boarding the train when it was in motion, was not the immediate and proximate cause of his injuries, for he got on the train in safety; that the defendants had not succeeded in establishing that the plaintiff was guilty of negligence with-

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out which the accident would not have happened; and he gave judgment for the plaintiff for \$4,000 damages with costs.

October 23 and November 16. The appeal was heard by MULLOCK, C.J.Ex., CLUTE, RIDDELL, and LENNOX, JJ.

W. N. Tilley, for the appellants, argued that the plaintiff disobeyed the rules of the company in boarding the car while it was in motion; that the defect in the ladder was apparent, and it was his duty to inspect it. He referred to *Fawcett v. Canadian Pacific R.W. Co.* (1902), 32 S.C.R. 721, affirming the judgment in (1901), 8 B.C.R. 393; *Holden v. Grand Trunk R.W. Co.* (1903), 5 O.L.R. 301; *Perdue v. Canadian Pacific R.W. Co.* (1910), 12 Can. Ry. Cas. 216; *Deyo v. Kingston & Pembroke R.W. Co.* (1904), 8 O.L.R. 588; *Grand Trunk R.W. Co. v. Birkett* (1904), 35 S.C.R. 296, *per* Davies and Killam, JJ., dissenting; *Harris v. London Street R.W. Co.* (1907), 39 S.C.R. 398; *Pettigrew v. Grand Trunk R.W. Co.* (1911), 13 Can. Ry. Cas. 118, 2 O.W.N. 709; *Dominion Iron and Steel Co. v. Day* (1904), 34 S.C.R. 387; *Cook v. Grand Trunk R.W. Co.* (1914), 31 O.L.R. 183.

E. G. Porter, K.C., for the plaintiff, the respondent. The finding of the learned trial Judge that the car was defective is not in question, nor the amount of damages. The defendants contend, however, that the plaintiff's non-compliance with the rules disentitles him to recover. [*Tilley.* We contend that the negligence must be shewn to be that of some one for whom the defendants are responsible.] It was the duty of the train-master to make up the train and to see that it was properly inspected and in proper shape before it was handed over. The train-master saw the defect and did nothing to remedy it. The rules must be construed in a reasonable way, having regard to the circumstances. The plaintiff did all that he was required to do. Division of labour is necessary in such cases, and the brakesman and he each inspected one side of the car, which he knew had been already inspected by the train-master before the train was made up. He made an honest effort to comply with the rules. His getting on the car while it was in motion was not the cause of the accident. He was lawfully on top of the car, and was

justified in getting back to the caboose, as he attempted to do. Reference to Jacobs' Railway Law of Canada, p. 550; *Warming-ton v. Palmer* (1902), 32 S.C.R. 126.

Tilley, in reply, referred to the *Birkett* and *Deyo* cases, *supra*.

November '30. CLUTE, J.:—Appeal from the judgment of the Chief Justice of the King's Bench, who tried the case without a jury.

The plaintiff, on the 18th December, 1913, was conductor on a freight train proceeding from Belleville to Brockville over the defendants' line of railway, and alleges that, when a short distance from Napanee, while walking over the tops of the cars composing the said train to reach the caboose, he attempted to climb down a ladder on one of the cars, and, on his stepping on the ladder, it gave way, throwing him to the ground in such a manner that the train ran over his left arm, injuring and crushing the same so severely that it had to be amputated. The plaintiff claims that the ladder was unsafe and defective, and that his injuries were occasioned thereby.

The defendants deny negligence, and say that, if the accident was in any way caused by the negligence of a person in the service of the defendants, it was the act of a fellow-servant, and further charge that the injury complained of was due solely to the plaintiff's neglect and want of care.

The trial Judge found that "the plaintiff's injuries were caused by the defective ladder, which was part of the equipment of the train. His infraction of the rules in boarding the train in motion, and when he did, was not the immediate and proximate cause of his injuries. He got on board in safety. The defendants have not succeeded in establishing that the plaintiff was guilty of negligence without which the accident would not have happened;" and he gave judgment for the plaintiff for \$4,000.

The principal facts of the case, as I gather them from the evidence, are as follows:—

The plaintiff's train consisted of 42 cars, among which and forming part of the train, next to the caboose, was a damaged

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car which had been in an accident. It was not carried upon its own trucks, and appeared to be in a damaged condition, and was being sent forward to Montreal for repairs. The ladder from which the plaintiff fell was upon the north-east corner of this car, and had been damaged and rendered unfit for use. Bunton, employed by the defendants, who was car-foreman and had charge of car repairs, car inspectors, and car cleaners, states that the car was inspected by Charles Smith and Robert Petrie, who were under his charge, and that he inspected the car himself while it was in the repair siding the day before it was taken out.

“Q. Did you examine the ladder? A. Yes, sir.

“Q. Did you notice that the bar of the ladder was in the shape that that bar indicates? A. Yes, there were several in that shape.

“Q. You noticed that the bar was in that shape? A. Yes, and others as well.

“Q. What I am calling your attention to there is, that it was just held by two little sticks there, and the rest of it was broken off; did you notice that? A. Yes, sir.

“Q. And you noticed the condition of the other side too, that it was partly broken off. A. I didn't at that time.

“Q. How did you come not to notice it at that time? A. It might not have been apparent.

“Q. The inspection you made did not reveal that? A. It was more of a casual inspection, because I took such steps that no man could get on those broken rungs.

“Q. The inspection you did make didn't discover it was partly broken off in that way? A. No, I did not; I knew it was badly bent.

“Q. Did you take any special precaution in regard to this car so far as Mr. Smith was concerned? A. I had the work done.

“Q. I want to know what you did yourself, did you do anything yourself in regard to it? A. No, sir.

“Q. Did you call Mr. Smith's attention to it in any way? A. No.

“Q. What do you know of your own knowledge was done in regard to the car, what did you see done? A. The corner of the

car was taken out, and I had them jacked into position and wired into position; I had these stirrup steps turned under the car so they couldn't be stepped on.

"Q. Was there anything on the car or on the ladder to shew a man that he should not attempt to use that part of the ladder that was there? A. It was very apparent.

"Q. Was there anything there to shew him? A. I would not like to trust myself on the ladder.

"Q. Was there anything there to shew that a man should not do that? A. The ladder side where these ladder rungs are rivetted to, that was broken off and out of place three or four inches, that would bend the grab-iron, and the other bars were bent.

"Q. They might be bent and still hold a man; how would a man know that, would there be any way for a man to know that? A. I think if a man looked at that car at all, he could see it would be better to leave it alone, stay off it.

"Q. It was just such a thing that a man might make a mistake in it? A. He might forget all about it, of course.

"Q. He might make a mistake and think it was all right. It might appear to one man all right and to another not all right? A. Some might be more careful than others.

"Q. It might appear all right to one man and not to another? A. Yes, it might."

There is other evidence to the same effect, and there can be no doubt at all that the ladder was dangerous and unfit to be used. Bunton further says that this car had been in an accident. It came in a day or two before. It was his duty to put it into shape to go to Montreal; to do the best he could; to make it as safe as he possibly could. He said that he would give instructions to other men to do the work, and then see that the work was carried out; that he saw the car when it was "O.K.'d out;" and that everything was done with the facilities that were at hand. He says that the ladder might have been boarded up, as is sometimes done; that is, a board put over it to prevent it being used as a ladder.

"Q. Knowing that this ladder was defective and in your

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judgment not safe, why didn't you do that. A. I didn't consider it was necessary, because I took away the only step by which a man could possibly get on the ladder, and the end ladder was in good condition to get over the top."

It was the plaintiff's duty to enter in a book the numbers of the cars making up the train. This he did, he going down one side of the train and the brakeman the other. The defective ladder was not on the side of the train that he inspected, and the brakeman does not appear to have noticed the defect.

It was described as a dark night, rather stormy. The train left Belleville about 4.15. It was still dark at Napanee. What happened was this:—

Before reaching the station at Napanee the train was stopped to allow another train to pull out. While it was stationary, the plaintiff was upon the ground. He swung his light for the train to start. When it started, he heard "some of the brakes squealing." He ran beside the train, and when he got where they were they had released slowly, and by that time the train was pretty well in motion, "and I thought I had better catch on where I was, for if I waited until the van came on it would be going too fast, so I caught on the train and went up on top;" and in doing that, he said, he was doing his duty and what would be expected of him.

"Q. What did you do then? A. I stood still till we got past the station; we have reports of the train which we call a consist, so I threw that off the train as usual, then I started back to the caboose over the top of the train. . . . I had to go back over to the end of the box-car and go down on the flat-car . . . I got to the caboose . . . I got over the flat-car and going up the side of the box-car, the last car, the rung when I stepped over on the side of the ladder, the rung broke."

It gave way under his feet—that caused him to fall. He caught again towards the bottom rung, and, as there was no step to the car, he tried to draw himself up, and the broken rung gave way again, and he fell to the ground, the car passing over his arm.

The two points upon which the defence was mainly rested

were: (1) that it was in breach of the rules to climb on the car while in motion; (2) that it was his duty to inspect the car, and that if he did not discover the defect it was his own fault.

As to his boarding the car while in motion, rule 254 provides that every employee is required to exercise the utmost care to avoid injury to himself and to his fellows, and especially in switching or other movements of trains. Jumping on or off trains or engines in motion is forbidden. It is not forbidden to be on the top of the car. The plaintiff was not injured in mounting the car while in motion; and, while his doing so, even under the circumstances in this case, might have been in breach of the rule, it did not cause the injury, and when he reached the top of the car he was rightfully there. Mr. Tilley was under the impression that there is a rule prohibiting employees from riding on the top of the cars, but, when invited to point it out, he was unable to do so; and the evidence shews that the running-board on top of the cars is for the purpose of the trainmen passing along it when necessary. As found by the trial Judge, his boarding the train while in motion was not the proximate cause of his injuries.

As to the duty of the plaintiff as conductor to inspect the train before starting and at the way stations, reference was made to rule 107 and bulletin number 5. Rule 107 declares that conductors and brakemen must know that the cars in their train are in good order before starting, and inspect them whenever they have an opportunity to do so, particularly when entering or leaving sidings or waiting for other trains. All cars taken into their train at intermediate stations must be examined with extra care. Bulletin number 5 provides that "freight train-men must know that their train has been inspected before leaving the terminal, and that the couplings, brakes, ladders, running-boards and running-gear are in good order, and car-doors fastened and properly secured. Any neglect of car inspectors must be reported to train and yard-masters and to car foremen at once. They must also inspect train carefully at all stops . . . examine all cars taken on at intermediate stations, and, if not in safe condition, leave them and report to train-master, giving

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him particulars." In the present case the plaintiff says that he did make inspection of the cars of his train, and took the number, and did not notice or know of the defect in the ladder.

Inspector Bunton did know of the defect. The car, he states, had been inspected by the two under him and by himself; it was his duty, as appears in his evidence above-quoted, to do what was necessary to the car in question before sending it out; and he says he did what he thought necessary in regard to the ladder, but he did not notify the plaintiff of its dangerous condition.

Whether the plaintiff discharged his duty, under the circumstances of the case, in a reasonable and proper manner, is a question of fact; and, in the opinion of the learned trial Judge, the defendants have not succeeded in establishing that the plaintiff was guilty of negligence without which the accident would not have happened. There is evidence to support this view; and, if the finding of the trial Judge is right, that the ladder was a part of the equipment of the train, as I think it is, then there is a breach of statutory duty on the part of the defendants in sending out the car with a defective ladder, contrary to the Railway Act, R.S.C. 1906, ch. 37, sec. 264, sub-sec. 5: "All box freight cars of the company shall, for the security of railway employees, be equipped with,—(a) outside ladders, on two of the diagonally opposite ends and sides of each car, projecting below the frame of the car, with one step or rung of each ladder below the frame, the ladders being placed close to the ends and sides to which they are attached; and (b) hand grips placed anglewise over the ladders of each box car and so arranged as to assist persons in climbing on the roof by means of the ladders."

This statutory duty was not performed, and that was the proximate cause of the injuries sustained by the plaintiff.

Many cases were referred to, among which are *Warmington v. Palmer*, 32 S.C.R. 126; *Fawcett v. Canadian Pacific R.W. Co.*, 32 S.C.R. 721; the last case referred to was especially relied on by Mr. Tilley. In that case a brakeman and conductor in the employ of the defendant company, while turning a brake wheel, fell from his train and was run over and killed. The nut which fastens the brake-wheel to the brake-mast, and which should have

been on, was not on, and so the wheel came off and the accident resulted. It was the duty of the deceased to examine the cars of the train and see that they were in good order before leaving the station which the train was just leaving. At the trial the case was withdrawn from the jury by Irving, J., who directed judgment to be entered for the defendant. The reasons of Irving, J., for the nonsuit are given on p. 394 of the report below, 8 B.C.R. He says: "Now, in this case the plaintiff, according to the rules of the railway, was required to 'carefully examine couplings, wheels and the running gear of all cars in their train' (rule 83), and by rule 93, 'to see that their cars are in good order' before the leaving of the train. This, to my mind, compelled him to examine the wheels, shoes of the brakes, brake-beams, etc., and ultimately the brake-wheel itself to see that it was in good working order, that is with safety to the person using it. The cause of the accident is not in dispute. It was that the brake-wheel was insecurely attached to the brake-mast. There may have been negligence on the part of the company, but there was negligence also on the part of the conductor, Fawcett, who was killed. He neglected to do that which was prescribed by the company should be done for the security of himself, of the brakeman who might have to handle that brake and possibly of the passengers who might be riding on the train. The case is very much like that of *Truman v. Rudolph* (1895), 22 A.R. 250, where a master brewer sued his employer under the Workmen's Compensation Act for an injury resulting from falling from a defective ladder which it was his duty to inspect. In that case the master brewer saw the defect and instructed a subordinate to repair it, but neglected to see that the repairs were carried out, and Mr. Justice Osler, in delivering judgment in the Court of Appeal, says, at p. 254: 'The defective condition of the ladder was owing, as this evidence shews, to the unfortunate plaintiff's own neglect, not in the sense of contributory negligence, but neglect in not seeing that the ladder was put in a properly secure condition. He was the person whose duty it was to see that this was done, and his own neglect was what led to the injury.' A judgment of nonsuit was there approved. For this

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reason I withdraw the case from the jury and direct judgment to be entered for the defendants with costs.''' On appeal to the Full Court, this judgment was affirmed. The plaintiffs then appealed to the Supreme Court of Canada; after hearing counsel for the parties, the Court reserved judgment, and on a subsequent day dismissed the appeal, for the reasons given in the Court below.

It will be seen that in the Court below, Irving, J., whose judgment was sustained, relied upon *Truman v. Rudolph*, 22 A.R. 250. In that case both the workman and his employer knew of the defect that ultimately caused the injury, and it was the workman's own duty to see that the defect was remedied; the orders given by him were not carried out, and it was held that he could not recover. In the present case the plaintiff did not know of the defect, nor was it his assigned duty to remedy it, if he did know. It was the duty of Bunton, the inspector, who had two men under him, and whose duty it was to put the cars in a safe condition to be shipped for repairs. In the *Truman* case it was pointed out by Osler, J.A., that the workman is not entitled to compensation under the Act in any case where he knew of the defect or negligence which caused his injury, and failed without reasonable excuse to give information thereof within reasonable time to his employer. If a reasonable excuse exists—and whether it does or not is for the jury upon the evidence—an action lies. The *Truman* case was decided under the Workmen's Compensation for Injuries Act, 1892, sec. 6, subsec. 1, it being the duty of the plaintiff himself to see that the defect of which he had knowledge was remedied.

In *Deyo v. Kingston and Pembroke R.W. Co.*, 8 O.L.R. 588, the defendants, contrary to the statute, had permitted an overhead bridge to remain, which did not give an open and clear headway of seven feet between the top of the car and the bottom of the lower beams of the bridge, which was over the right of way. It was there held that contributory negligence may be a defence to an action founded on a breach of statutory duty, and that a brakeman standing on top of a freight car, part of a moving train, who was killed by coming in contact with the overhead

bridge, could not recover, as by rule 32 brakemen and others were strictly forbidden to ride on top of box freight cars under the overhead bridge in question. Osler, J.A., pointed out that the accident was caused by the direct disobedience of a rule of the company by the plaintiff.

In *Muma v. Canadian Pacific R.W. Co.* (1907), 14 O.L.R. 147, the *Deyo* case is distinguished.

In *Grand Trunk R.W. Co. v. Birkett*, 35 S.C.R. 296, the judgment of the majority of the Court was given by Nesbitt, J.; Davies and Killam, JJ., dissenting. Held, that where the plaintiff, a conductor upon a train, had jumped off while it was in motion, he could not recover, as it was his disobedience of the rules which brought him into a situation where he had no right to be and where the company had no right to expect him to be. The effect of this judgment, as I read it, is that under the facts there stated the plaintiff was the cause of his own injury.

Cook v. Grand Trunk R.W. Co., 31 O.L.R. 183, was disposed of upon the answers of the jury, whose finding was conclusive against the right of the plaintiff to recover, and, as pointed out by Meredith, C.J.O., it was unnecessary to consider whether the plaintiff's entering between the cars while in motion, in contravention of the rules, and bringing himself into a situation where he had no right to be and the respondent had no right to expect him to be, was the proximate cause of the accident, as to which reference is made to the *Birkett* case.

The case bearing upon the present most recently considered in the Supreme Court is that of *Stone v. Canadian Pacific R.W. Co.* (1913), 47 S.C.R. 634, not cited upon the argument. In that case the plaintiff, who was a brakeman on a freight train of the defendants, when it became his duty to effect a coupling, went down the ladder near the end which was approaching the other car, with the intention of getting hold of the coupling-rod to open the knuckle so as to receive the coupler of the other car. He went to the bottom step, and, with his left foot resting on it, he held on to the last rung of the ladder with his left hand and endeavoured to reach round the end of the car to the coupler. While he was in this position, the moving train passed over a crossing, and the jar caused his foot to slip from the bot-

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tom step, and he fell under the wheels. In an action for damages it was held by the Court of Appeal (1912), 26 O.L.R. 121, that what befell the plaintiff was not due to the absence of a ladder nor to the insufficient length of the coupling-rod, but to the plaintiff's not having taken a proper course, namely, to signal the engineer to stop the train and then get down and make the coupling, which he could have done; that there was no evidence of negligence on the part of the defendants and no evidence to sustain the findings of the jury. The jury found that the car was not reasonably safe, and that the plaintiff had acted to the best of his knowledge, and that the injury was caused by a defect in the car, in that it lacked the ladder on the end of the car and the long lever equipment. They acquitted the plaintiff of negligence. The Supreme Court reversed the judgment of the Court of Appeal, and treated the question as one of fact for the jury—that in fact what the plaintiff did was reasonable under the circumstances, and that he was not guilty of contributory negligence; Fitzpatrick, C.J.C., dissenting on the ground that the plaintiff's negligence was the sole cause of the accident.

The present case is more nearly like the *Stone* case, and should, I think, be governed by it. The trial Judge has found in favour of the plaintiff, and there is evidence which, in my judgment, supports the finding. To put it shortly, the plaintiff acted reasonably throughout, assuming that, even under the circumstances detailed by him, he had no right to get on the car while in motion, and his so doing was not the proximate cause of the injury. Having once reached the top of the car, the danger aimed at by the rule was past. He had the right to go where his duty called him, which was to the caboose, and to do so to pass over the cars and to avail himself of the ladder in question. This car was made up and formed part of the train. Its defect was known to the inspector, whose duty it was to remedy the defect to the extent that it should not be dangerous if used. This he attempted to do by removing the lower step, but left the remainder of the ladder in the dangerous condition in which it was at the time of the accident. The plaintiff made a reasonable inspection of the train, he going down one side and his brakesman the other. The morning was dark, and the

defect was not discovered. The question of contributory negligence was one of fact for the trial Judge, who has disposed of it in favour of the plaintiff. I see no ground to interfere.

The appeal should be dismissed with costs.

MULOCK, C.J.Ex., and LENNOX, J., agreed.

RIDDELL, J. (dissenting):—A car upon the line of the Grand Trunk Railway was in an accident and became somewhat battered: it was necessary to take it east from Belleville for repairs: accordingly the box of the car was put upon other trucks and placed in a train to go east. As it was noticed that (what was to be when the car was in the train) the outer south-eastern ladder was broken, the stirrup was bent up so that no one would climb up on or by it—a clear prohibition, as it seems to me, against the use of this ladder. The plaintiff, the conductor of the train, knew that the car was not a car in the usual sense of a vehicle carrying freight or an “empty” going east for freight; it was manifested as defective and manifestly so—he saw it, saw the stirrup of the ladder turned up, knew that the car was going for repairs.

At Napanee, instead of giving the signal to start and getting in his caboose while the slack was being taken up in the train about to set off, he violated the law by jumping on the train when in motion, and so got on a part of the train to which his duty did not call him. He then made his way back over the train toward the caboose, used the ladder on the outer south-east corner, fell and was seriously injured.

On action brought, the Chief Justice of the King’s Bench gave him judgment: the defendants now appeal.

I have the misfortune not to agree with my learned brethren’s view.

Remembering that there is no such thing as negligence at large, but that actionable negligence must be breach of a duty owed to the person complaining, it seems to me, with great respect, that a statement of the facts should be sufficient to shew that the plaintiff should not succeed. That it was not negligence

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to take the body of the car for repair elsewhere must be obvious: otherwise a car when damaged must be scrapped or repaired on the spot, which is absurd. It was not represented as a perfect car or as a vehicle to be used as an ordinary car; on the contrary, it was plainly a damaged article, and so represented—not really part of the “plant,” but being taken as freight to the repair-shop.

There was nothing in the plaintiff’s employment calling for him to run along the top of the cars to get to his caboose—and the defendants had no right to expect that he would do so. I fail to see negligence towards the plaintiff; nor have, as I think, the regulations requiring ladders on cars any reference to a car being taken for repair under circumstances like the present.

Every necessary precaution was taken that the plaintiff should know, and he did know, all that was necessary about the car.

The plaintiff was going to the caboose (his proper place when the train was in motion) by a way not contemplated by the defendants, and which was used only because he had already violated the law. If I direct my servant to go to my barn, I impliedly undertake that the usual and proper way to it shall be safe: but I do not undertake to find a safe way from a place into which he has got by climbing a fence which I forbade him to climb.

Then as to the plaintiff: he was, as has been said, going the wrong way to his place in the caboose—this may not be conclusive as to contributory negligence. But in doing this he used a ladder which had been out of commission, and its use forbidden by the bending up of the stirrup—and that was the direct and immediate cause, *causa causans*, of the accident.

Aside from the violation of implied orders, I think we should find the act of so using an appliance on a damaged car, without any examination, contributory negligence. The cases do not seem to me to be helpful—the matter is one of principles undoubted and uncontroverted. If the learned Chief Justice finds differently, i.e., negatives contributory negligence, the finding should be reversed.

It seems to me that a fair test is this: suppose an action had been brought by a third party charging the company with negligence in that the conductor, their servant, acted as he did in the present case, could any jury—would any jury be allowed to—say that the defendants were not guilty, through their servant, of actionable negligence?

I think the appeal should be allowed with costs and the action dismissed with costs.

Appeal dismissed; RIDDELL, J., dissenting.

[APPELLATE DIVISION.]

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Infant—Agreement for Purchase of Land—Payment of Sum as Deposit—Right to Recover—Absence of Fraud—Consideration.

Although an infant is not compellable to complete a contract, yet when he has paid money under it, he cannot recover it back unless he can shew that fraud has been practised upon him.

Wilson v. Kearse (1800), Peake Add. Cas. 196, and *Holmes v. Blogg* (1817), 8 Taunt. 35, 2 J. B. Moore 552, approved and applied to a case where the plaintiff, an infant, agreed to purchase from the defendant a house and lot and paid a deposit at the time the agreement was signed, and where the evidence negatived any misrepresentation on the part of the defendant, and shewed that the plaintiff took possession of and controlled the property.

AN action to recover a sum of \$200 paid by the plaintiff (an infant) to the defendant on account of the purchase of a house and land; and for damages for misrepresentation.

The action was tried by BOYD, C., without a jury, at Sarnia.

J. Cowan, K.C., for the plaintiff.

D. S. McMillan, for the defendant.

December 4. BOYD, C.:—This action is by the plaintiff, an infant, suing by his father as next friend, in respect of an agreement made by him to purchase from the defendant, for \$1,400, a lot of land in Sarnia called and known as lot 501, Confederation street. The dimensions of this lot, which has a house on it, were 40 ft. by 60, and it is so described in tax papers and other

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documents in evidence. The plaintiff alleges that the size of the lot was misrepresented by the defendant as being in effect 47½ by 72; and, for this reason and on account of his infancy, he gave notice to avoid the transaction. His father had been the agent in negotiating the sale and matters connected therewith, and the father had paid on the son's account \$200 as a deposit at the time the contract was signed. The evidence negatives any misrepresentation on the part of the defendant, and shews that the purchaser was aware of the lot being a small one and its dimensions 40 ft. by 60. The plaintiff alleges that he received no consideration for the money paid, and that he did not take possession. This position is hardly accurate. There was a tenant in the house at the time of sale (7th February, 1914), Mrs. Bell, paying \$11 a month, who was perfectly satisfactory to the defendant. The plaintiff, after buying, brought many people to see the house, and directed it to be sold, at an advance of \$100, by a land agent. The disturbance of these inspections caused Mrs. Bell to leave; and the plaintiff's agent—the father—rented the place to another person at an advanced rent, without reference to the defendant. It cannot be said that the plaintiff did not interfere with the possession and occupation of the place in consequence of his becoming the purchaser from the defendant.

Given these facts, how stands the law? And upon that there is somewhat of obscurity so far as authoritative decisions go. The only direct case I have found is a *nisi prius* decision reported as *Wilson v. Kearse* (1800), Peake Add. Cas. 196. It is quoted in a note to Fry on Specific Performance, 4th ed. (1903), p. 204, as holding that an "infant cannot recover a deposit paid on the contract, except on the ground of fraud." This note appears in the same terms in the 1st edition of Fry (1858), p. 133.

Turning to Simpson on Infants, 3rd ed. (1909), p. 64, I extract what appears in a note: "The remark of Lord Mansfield in *Earl of Buckinghamshire v. Drury* (1761), 2 Eden 60, 72, quoted without disapproval by Wilmot, C.J. (Notes, 226, *n*), that 'if an infant pay money with his own hands without a valuable consideration, he cannot get it back again,' must, if correctly reported, be regarded as overruled. Probably, however, 'without' is a misprint for 'with,' and Lord Mansfield only referred to

cases where the consideration had been enjoyed by the infant. In *Wilson v. Kearse*, 2 Peake Add. Cas. 196, an infant contracted to buy a public-house, and paid a deposit: on avoiding the contract, he was not allowed to recover the deposit. The case is a *nisi prius* one, very shortly reported, and it is possible that the infant had been in occupation."

Wilson v. Kearse was a decision by Lord Kenyon in 1800, but not published till 1829. The plaintiff, being an infant under twenty years of age, contracted to purchase the goodwill and stock of a public-house, and made a deposit of £20. Being afterwards called on to complete the contract, he refused, upon which the defendant sold the goodwill, etc., to another person, and the plaintiff, after demand to have the money repaid, brought his action to recover it. The Chief Justice was of opinion that, though an infant was not compellable to complete a contract, yet that when he had paid money under it, he could not recover it back unless he could shew that fraud had been practised upon him.

The reporter refers in a note to *Holmes v. Blogg* (1817), 8 Taunt. 35, 2 J. B. Moore 552, in which precisely the same view of the law is taken by Gibbs, C.J., in 1817. The Chief Justice treats the point as one arising for the first time (Peake's Cases, first published in 1829, not then being known to the profession), and the decision is directly in affirmance of the ruling of Lord Kenyon.

Again, both cases are cited and relied on and followed in *Ex p. Taylor* (1856), 8 DeG. M & G. 254.

Despite the disparagement cast on the case by Simpson, I do not find that *Wilson v. Kearse* has been otherwise impeached. It is found relied on in the text of Dart on Vendors and Purchasers, 7th ed., p. 33, and especially in Sugden on Vendors and Purchasers, 14th ed., p. 209, and lastly in Cyprian Williams on Vendor and Purchaser, 1st ed., vol. 2, p. 801.

I do not think that the last word has been said as to Lord Mansfield's doctrine that an infant cannot get back money that he pays without consideration. The suggestion of a misprint of "without" for "with" cannot be seriously advanced, in view

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of the way in which the point is fully discussed in *Holmes v. Blogg*.

In the case cited by Mr. Cowan of *Corpe v. Overton* (1833), 10 Bing. 252, the Court do not impeach the decision in *Holmes v. Blogg*, 8 Taunt. 35, and distinguish it on the facts. *Holmes v. Blogg* is put on the ground that the infant had received something of value for the money he paid, whereas in *Corpe v. Overton* he had not received the slightest consideration. *Holmes v. Blogg* rests also upon an independent ground, which was adverted to in *Wilson v. Kearse*, viz., that the infant had been led into the transaction by exaggerated representations of value, which the jury found to be fraudulent. *Corpe v. Overton* was discussed by Stirling, J., in *Hamilton v. Vaughan-Sherrin Electrical Engineering Co.*, [1894] 3 Ch. 589, and also in *Everett v. Wilkins* (1874), 29 L.T.N.S. 846.

But I need not follow further this line of inquiry—for here there was no lack of consideration.

By the transaction the infant became, while the contract lasted, potential owner of the place. He entered upon it, by the land agent, and he changed the manner of occupation by the admission of a new tenant at an increased rent, which enured to the plaintiff's benefit. His purchase was on the 7th February, and his action was not till the 23rd April, 1914.

It is my duty to accept *Wilson v. Kearse* as a correct decision; and I, therefore, have to dismiss the plaintiff's action with costs.

The plaintiff appealed from the judgment of Boyd, C.

February 11, 1915. The appeal was heard by a Divisional Court of the Appellate Division (FALCONBRIDGE, C.J.K.B., RIDDELL, LATCHFORD, and KELLY, JJ.)

J. Cowan, K.C., for the appellant.

D. S. McMillan, for the defendant, respondent, was not called upon.

THE COURT dismissed the appeal with costs, adopting the reasons of the Chancellor.

[APPELLATE DIVISION.]

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Master and Servant—Death of Servant—Action under Fatal Accidents Act—Explosion of Hot Water Range Attachments in Hotel Kitchen—Negligence—Evidence—Employment of Competent Person—Responsibility of Hotel Company for Negligence of Manager—Common Employment—Duty of Master—Reasonable Care—Independent Contractor—Findings of Jury.

In an action under the Fatal Accidents Act to recover damages for the death of a servant (head waitress) in the defendant company's hotel, by an explosion of the range or hot water attachments in the kitchen, it appeared that the manager of the hotel had employed a plumber and steam-fitter to make some alterations in the hot water system, and that the alterations were made by this man shortly before the explosion. The jury found: (1) that the defendant company was guilty of negligence which caused the death; (2) that the negligence was, not having the hot water system properly installed and inspected, and that the manager neglected his duty, which was to have the work examined as soon as he found it was not satisfactory; (3) that danger to persons in the kitchen would be reasonably expected to arise from an appliance formed by connecting the water-front with the steam coils, unless measures were adopted to prevent such danger; (4) that the defendant company did not take reasonable care to prevent such danger; (5) that the defendant company exercised reasonable care in employing a manager; (6) that the manager was competent; (7) that the manager did not exercise reasonable care in employing the plumber; (1a) that it was the negligence of the manager and the plumber which led to the explosion; (2a) that the plumber in the construction of the appliance left something undone which led to the explosion; (3a) that the plumber did something in the construction of the appliance that led to the explosion. There was no claim under the Workmen's Compensation for Injuries Act:—

Held (CLUTE, J., dissenting), that there was no evidence to support findings 2, 3, and 6, nor finding 1a, so far as it related to the manager, and that these findings should be set aside, and the judgment of BRITTON, J., at the trial, dismissing the action, affirmed.

A householder who employs a competent plumber and steam-fitter to make a connection between his furnace and his kitchen is not answerable for any injury that may be occasioned to his servants owing to the neglect of the plumber to provide some safety device which he erroneously believes to be unnecessary—at all events, unless the householder knows or ought to know of the defect; and in this case there was no evidence of the plumber's incompetency beyond the fact that the work which he did on this occasion was unskilfully done, and there was no evidence that the defendant company or the manager knew that the plumber was incompetent.

The nature and extent of the duty which a master owes to his servants with regard to the place in which and the appliances with which they are called upon to do their work, defined.

Smith v. Baker & Sons, [1891] A.C. 325, 362, and *Lovegrove v. London Brighton and South Coast R.W. Co.* (1864), 16 C.B.N.S. 669, 691, 692, specially referred to

The duty of the employer is not an "absolute duty," except in the sense that it is a duty which he may not delegate; and in this case the defendant company would be responsible for any neglect on the part of the manager to take reasonable care and provide proper appliances, though as to other matters there would be no liability at common law because the manager was a fellow-servant of the deceased.

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Bergklint v. Western Canada Power Co. (1914), 50 S.C.R. 39, 67, explained.

The question of the liability of the defendant company for what was done by the plumber, regarding him as an independent contractor, was not considered.

Per CLUTE, J.:—There was evidence to support all the findings of the jury. The proximate cause of the explosion was the manager's negligence in directing and permitting the installation without waiting for a plan which would have made it safe. The system was incomplete, and no proper precautions, without which danger was imminent, were taken. And there was nothing in law which, upon the findings and facts, precluded the plaintiffs from having judgment.

Review of the authorities.

McArthur v. Dominion Cartridge Co., [1905] A.C. 72, specially referred to.

ACTION under the Fatal Accidents Act to recover damages for the death of the plaintiffs' daughter by reason of the negligence of the defendants, as the plaintiffs alleged.

May 9. The action was tried by BRITTON, J., and a jury, at Sault Ste. Marie.

J. E. Irving, for the plaintiffs.

Gideon Grant, for the defendant company.

July 2. BRITTON, J.:—The plaintiffs are the parents of Jean Junor, who when living was the head waitress in the defendant's hotel at Sault Ste. Marie, and who at that hotel was killed on the 18th May, 1913, by the explosion of the range, or hot water attachments thereto, in the kitchen of the hotel, where the said Jean was in the performance of her ordinary work. This action is brought under the Fatal Accidents Act, the plaintiffs being father and mother respectively, and being persons having a reasonable expectation of pecuniary interest or benefit in the life of their daughter.

The negligence charged is, that the defendant so negligently and carelessly set up and installed the range and attachments as to cause the explosion. The plaintiffs further allege that it was the absolute duty of the defendant to provide a safe place for the daughter Jean to work, and the defendant failed in its duty in that regard.

The defendant's manager of the hotel was one Pollock. He was not an expert—in fact he did not know anything about putting up the range—so he employed Emanuel J. Gallagher to do the work.

After the close of the evidence and after some discussion with counsel and the jury, the following questions were put to and answered by the jury:—

(1) Were the defendants guilty of any negligence which caused the death of Jean Junor? A. Yes.

(2) If so, what is the negligence you find? A. By not having the hot water system properly installed and inspected. The manager of the hotel neglected his duty, inasmuch as he neglected to examine the work, or cause to have it examined, immediately when he found it was not satisfactory.

(3) Would danger to persons in the kitchen of the International Hotel be reasonably expected to arise from an appliance formed by connecting the water-front with the steam coils, unless measures were adopted to prevent such danger? A. Yes.

(4) Did the defendants take reasonable care to prevent such danger? A. No.

(5) Did the defendants exercise reasonable care in employing a manager? A. Yes.

(6) Was the manager in the employ of the defendants, at time of installation of plant which caused the danger and at the time of the accident, a competent manager? A. Yes.

(7) Did the defendants' manager exercise reasonable care in the employment of Mr. Gallagher to install the work mentioned? A. No.

(8) Damages? A. Father, \$1,200; mother, \$1,200.

Additional questions:—

(1a) Whose negligence was it that led to the explosion? A. On the part of the manager, also of Gallagher.

(2a) Who in the construction of the appliance left anything undone the leaving of which undone led to the explosion? A. Gallagher.

(3a) Who, if any one, did anything in the construction of the appliance that led to the explosion? A. Gallagher.

Upon these answers each party claims to be entitled to judgment.

The case is by no means free from difficulty. I have looked at all of the many cases cited by counsel, and at other cases. My

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conclusion is, that the defendant can successfully invoke for its defence the doctrine of common employment.

This is a common law action. The plaintiffs have no claim under the Workmen's Compensation for Injuries Act; so, unless there is liability at common law, the plaintiffs cannot succeed.

The plaintiffs rely upon *Ainslie Mining and R.W. Co. v. McDougall* (1909), 42 S.C.R. 420, as correctly stating the law: "An employer is under an obligation to provide safe and proper places in which his employees can do their work, and cannot relieve himself of such obligation by delegating the duty to another;" and, "if an employee is injured through failure of his employer to fulfil such obligation, the latter cannot, in an action against him for damages, invoke the doctrine of common employment."

I do not understand that case to mean that, whenever an accident happens to an employee in the course of his employment, in the room or upon the premises provided by the employer, the place is to be considered an unsafe and improper place in which to work. There is no warranty, on the part of the employer, that the employee will not meet with an accident while at work. The right of action is founded upon negligence; and, if there is no negligence in providing and maintaining the place where work is being done, if it is safe and proper for the work to be done, and if there is no negligence in respect to the particular act or thing which causes the injury to the workman, there is no liability. The building must be structurally safe—it must be free from pitfalls, from dangerous openings insufficiently guarded, and from dangerous machinery unprotected. The contention of counsel for the plaintiffs, in his very able conduct of this case, is, that the kitchen of the hotel, from the time of the attachment of the steam heating to the range, was not a safe place for the hotel employees to work in. If it was not safe, it was for the time made unsafe by the negligence of Gallagher. The contention is, that if Gallagher was an ordinary servant of the employer, the employer is liable—and, even if an independent contractor, the defendant is liable; and many cases were cited in supposed support of this contention.

Jones v. Canadian Pacific R.W. Co. (1913), 30 O.L.R. 331, has no bearing, as in that case there was breach by the defendants of a statutory duty.

The most recent case on the point of independent contractor is *Vancouver Power Co. v. Hounscome* (1914), 49 S.C.R. 430.

Upon what may be considered as undisputed evidence, the negligence which caused the accident was that of Gallagher. His work was repair work. He was called in as a known man, supposed to be competent, and as one engaged in and doing a large business. The defendant knew nothing about it, but the defendant's manager did. The manager was competent, as the jury found, and the defendant exercised reasonable care in selecting and employing him. Both the manager, Pollock, and the workman, Gallagher, were fellow-servants with the deceased of the defendant. If there is anything left of the doctrine of common employment, as I think there is, it must be applied in this case.

In my opinion, if there is any liability, it is because of the answers of the jury to the 3rd and 4th questions. These questions were put at the request of counsel for the plaintiffs.

I am of opinion that there was no evidence that should be submitted to the jury, that danger to persons in the kitchen of the hotel would reasonably be expected to arise from an appliance formed by connecting the water-front with the steam coils. It was not shewn that any such accident had ever happened in that hotel, or anywhere, to the knowledge of the defendant. Steam heating and hot water heating are in general use. The hotel kitchen was free from all such sources of danger, when the manager and the deceased accepted employment. The manager as an employee sought to have changes made and repair-work done; and, by the negligence of the person employed, the accident happened. The defendant was not notified of the work, or of any danger as likely to arise in connection with the heating, as it had been or was to be.

I am also of opinion that there was no evidence to go to the jury which would enable them to answer the 4th question as they did, by saying that the defendant did not take reasonable care to prevent such danger. My reasons are partly stated above, but

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I repeat. The company appointed a competent manager, who, in turn, knowing of no possible danger, selected a man in the business of steam and hot water heating to do what seemed to the manager, and reasonably so, an ordinary job.

There was no evidence that want of inspection, under the circumstances, was negligence. The man employed to do the work was such a person as would be employed to inspect, if any inspection were required, in the case of work done by another. The servant assumes all ordinary and usual risks in accepting employment. If the risk was an obvious one, it was so to the employee as well as to the employer. The doctrine of assumption of risks applies as well to those arising during service as to those existing at time of hiring.

Upon the general question of limiting liability where the employer has secured competent workmen, see *Woods v. Toronto Bolt and Forging Co.* (1905), 11 O.L.R. 216.

In dismissing the action, I do so with some hesitation, because of what I regard as conflicting opinions upon the question, and I shall not be sorry if this important case receives the attention of a Divisional Court of the Appellate Division.

The action will be dismissed without costs.

The plaintiffs appealed from the judgment of BRITTON, J.

November 10 and 11. The appeal was heard by MEREDITH, C.J.O., MACLAREN and HODGINS, J.J.A., and CLUTE, J.

J. E. Irving, for the appellants. It was the absolute duty of the defendant to provide Jean Junior a safe place in which to work: *Union Colliery Co. v. The Queen* (1900), 31 S.C.R. 81, at p. 87; *Grant v. Acadia Coal Co.* (1902), 32 S.C.R. 427; *Canada Woollen Mills Limited v. Traplin* (1904), 35 S.C.R. 424; *McNally v. Halton Brick Co.* (1914), 5 O.W.N. 693, 6 O.W.N. 548; *Ainslie Mining and R.W. Co. v. McDougall*, 42 S.C.R. 420; *Brooks Scanlon O'Brien Co. v. Fakkema* (1911), 44 S.C.R. 412; *Bergklint v. Western Canada Power Co.* (1914), 50 S.C.R. 39. The evidence shews that the system was dangerous, and that Gallagher, the man employed to do the work, was incompetent. There was evidence to support all the jury's answers. It is the

duty of the master not only to provide a proper plant, but to maintain it in good condition. Therefore he must inspect it: *Murphy v. Phillips* (1876), 35 L.T.R. 477; *Wilson v. Merry* (1868), L.R. 1 Sc. App. 326, at p. 332. The manager of the defendant in this case did not inspect. The defendant was negligent in employing Gallagher: *Bergklint v. Western Canada Power Co.*, *supra*. The defence cannot invoke the doctrine of common employment: *Ainslie Mining and R.W. Co. v. McDougall*, *supra*; *Brooks Scanlon O'Brien Co. v. Fakkema*, *supra*. Gallagher was not an independent contractor, but was a servant of the defendant: *Mersey Docks Trustees v. Gibbs* (1866), L.R. 1 H.L. 93, at p. 114; Pollock's Law of Torts, 9th ed., pp. 434, 435; *Daniel v. Metropolitan R.W. Co.* (1871), L.R. 5 H.L. 45, at p. 61; *Hardaker v. Idle District Council*, [1896] 1 Q.B. 335, at p. 340; Halsbury's Laws of England, vol. 21, para. 797; *Stewart v. Cobalt Curling and Skating Association* (1909), 19 O.L.R. 667; *Fleuty v. Orr* (1906), 13 O.L.R. 59.

D. L. McCarthy, K.C., for the defendant company, respondent. The master does not warrant the safety of the servant's employment. He must only take reasonable precautions to make safe the place in which the servant works: *Collins v. Toronto Hamilton and Buffalo R.W. Co.* (1908), 13 O.W.R. 165; *Ballentine v. Ontario Pipe Line Co.* (1908), 12 O.W.R. 273. Gallagher was an independent contractor, and the defendant was not responsible for Gallagher's negligence: *Allen v. Hayward* (1845), 7 Q.B. 960; *Walker v. McMillan* (1881), 6 S.C.R. 241, at p. 275; *Saunders v. City of Toronto* (1899), 26 A.R. 265; *Valiquette v. Fraser* (1904-7), 9 O.L.R. 57, 12 O.L.R. 4, 39 S.C.R. 1. The evidence does not warrant the finding of the jury that the defendant's manager did not exercise reasonable care in employing Gallagher. There was no duty on the manager to have the work inspected. The evidence does not support the answers of the jury to questions numbers 2, 3, and 6.

Irving, in reply.

December 7. MEREDITH, C.J.O.:—This is an appeal by the plaintiffs from the judgment dated the 2nd July, 1914, which was directed to be entered by Britton, J., on the findings of the jury, after the trial at Sault Ste. Marie on the 9th May, 1914.

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The action is brought by the father and mother of Jean Junor, deceased, to recover, under the Fatal Accidents Act, damages for the loss occasioned to them by the death of the daughter, which it is alleged was caused by the negligence of the respondent.

The claim is based on the allegation that the deceased was killed owing to an explosion of a range, or the hot water attachments to it, in the kitchen of the respondent's hotel, in which the deceased was lawfully in the performance of her duties as head waitress in the hotel; that it was the absolute duty of the respondent to provide her with a safe place in which to work; that the respondent failed in that duty; and that her death was caused by the respondent's failure to perform it.

The material facts are few and simple, and most of them not in controversy.

In the respondent's kitchen there was a range, which was provided with a water-front, of which no use was made until the change to which I shall refer was effected, and there was also in the kitchen a steam table, which was heated by means of a jack connected with the boilers or heaters in the basement of the hotel. Apparently for reasons of economy, Mr. Pollock, the manager of the hotel, was desirous of having the steam table heated by the hot water system used for heating the range, and called in, for the purpose of ascertaining if this could be done, Emanuel J. Gallagher, a plumber and steam-fitter of upwards of twenty years' experience, carrying on business at Sault Ste. Marie. Gallagher advised that it could be done, and was employed to do it. He began the work on the 28th April, 1913, and completed it on the following day. According to his evidence, the work did not give the results he had anticipated from it, because the steam table did not get the heat in it which was expected, though there had been some improvement in that regard when Gallagher last examined the work about the 3rd May. At this time, according to his testimony, there was more heat in the coils than there had been previously. On the 18th May, an explosion occurred in the kitchen, which caused the death of the deceased. It was of considerable violence, and, according to the theory of the appellants, was due to the water-front hav-

ing become red hot, and the cold water, when it reached it, having been converted into superheated steam.

The appellants' contention was, that the connections made by Gallagher were defective in design, in that no proper vent was provided to enable the air in the pipes to escape, and that the inevitable result of this omission must be that sooner or later, if the system were operated, an explosion would take place; and there was evidence to support that contention, although there is opposed to it the testimony of Gallagher.

That the making of the connection was feasible, and that it could have been made without any danger arising from its use, is unquestionable; and, indeed, the effect of the evidence of the experts called by the appellants is, that the absence of the proper air vent was to be accounted for only by the want of skill of Gallagher and his ignorance of the elementary principles applicable to the operation of the system he was installing, or a disregard of them.

That the respondent's manager did not interfere in the work that was being done, and had no knowledge as to the feasibility of doing what he desired to have done or as to the proper manner of doing it, but relied as to this entirely on the skill of Gallagher, is not open to question.

It was proved that Garnet McGuire, a travelling salesman of the McClary Manufacturing Company, which had furnished the range, was asked by the manager his opinion of the feasibility of what he had in mind to do, and that McGuire said he thought it feasible, but said that he was not an expert, and promised to get information on the subject from his company. Owing to the absence of the company's expert, there was delay in getting the information, and it did not reach Sault Ste. Marie until after Gallagher's work had been completed, or, as I understand McGuire's testimony, until the day before that on which the explosion occurred.

The only other matters that need to be mentioned are the fact that, according to Gallagher's testimony, he informed the manager that he was not getting the satisfaction he had expected out of the work, meaning that it was not producing the

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heat he expected, "for a big water-front like was in the stove," and the statement by Gallagher that he explained his system to the manager, who said that it was the same system as McGuire's. I may observe here that, if McGuire is right as to the time when the McClary Manufacturing Company's plan reached Sault Ste. Marie, this could not have occurred until after Gallagher's work had been done, and but a few hours before the explosion occurred. . . .

[The learned Chief Justice then set out the questions given to the jury and their answers, as above.]

And upon these answers the learned trial Judge directed judgment to be entered dismissing the action.

It will be well at the outset to ascertain what duty a master owes to his servants with regard to the place in which and the appliances with which they are called upon to do their work.

The nature and extent of that duty has been expressed in different language by different Judges; but, when their statements are read in the light of the particular circumstances of the cases they were dealing with, they do not differ from the statement of Lord Herschell in *Smith v. Baker & Sons*, [1891] A.C. 325, 362, which is: "It is quite clear that the contract between employer and employed involves on the part of the former the duty of taking reasonable care to provide proper appliances, and to maintain them in a proper condition, and so to carry on his operations as not to subject those employed by him to unnecessary risk."

See also Halsbury's Laws of England, vol 20, para. 234, pp. 119, 120.

The learned counsel for the appellants contended that the duty of the employer is an absolute one, and that it is not limited by the qualification as to taking reasonable care which forms part of the statement of it by Lord Herschell. In the recent case of *Bergklint v. Western Canada Power Co.*, 50 S.C.R. 39, 67, Anglin, J., speaks of a similar duty as an "absolute duty," but I do not understand that that learned Judge used the word "absolute" in the sense in which the learned counsel used it, and that all that was meant is, that it is a duty which the em-

ployer may not delegate; and I agree that the respondent in this case is responsible for any neglect of this duty on the part of its manager, though as to other matters there would be no liability at common law because the manager was a fellow-servant of the deceased.

I am unable to discover anything in the evidence which warrants the finding of the jury that the respondent's manager did not exercise reasonable care in the employment of Gallagher, or that the manager's negligence, as well as that of Gallagher, "led to the explosion." Gallagher was a plumber and steam-fitter in apparently good standing and of upwards of twenty years' experience. The work as to which he was employed to give his opinion, and which he was afterwards employed to do, was a simple one, and one which involved no danger from the operation of it, if the most ordinary precautions were taken to provide an adequate vent for the air. It is a startling and to me a novel proposition that a householder who employs a competent plumber and steam-fitter to make a connection between his furnace and his kitchen does so at the peril of being answerable for any injury that may be occasioned to his servants owing to the neglect of the plumber and steam-fitter to provide some safety device which he erroneously believes to be quite unnecessary—at all events, unless the householder knows or ought to know of the defect.

All the witnesses, including the experts called by the appellants, agree that what the manager required to be done was feasible, and, as I gather from their evidence, could be done and the system be operated with safety, and, as I have said, was something that any plumber and steam-fitter who understood his business could be trusted to do.

There was no evidence upon which the respondent could be held liable for having employed an incompetent man to do the work which was entrusted to Gallagher.

There was no evidence of Gallagher's incompetency beyond the fact that the work which he did on this occasion was unskilfully done, and there was no evidence that the respondent or Pollock knew that Gallagher was incompetent.

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In *Lovegrove v. London Brighton and South Coast R.W. Co.* (1864), 16 C.B.N.S. 669, Willes, J., says (pp. 691-2): "Mr. Lionel Smith well pointed out that the only ground upon which the plaintiff could sustain this action, was, either that there was some evidence that the company were guilty of negligence in employing an incompetent person to lay the rails, or that the burthen of shewing his competency rested on the defendants, and that the plaintiff was not called upon to prove his incompetency. Now, was there any evidence that the company did employ an incompetent person? The only evidence was, one act of negligence committed by that person: he once omitted to use due and proper care in doing the work entrusted to him. If that (which I venture to doubt) is evidence of incompetency, it certainly was not evidence that the company knowingly employed an incompetent workman. Then, is the burthen of proof of the workmen's competency cast upon the master? I apprehend not. There is nothing to differ this from ordinary cases. It is not enough for the plaintiff to shew that he has sustained an injury under circumstances which may lead to a suspicion, or even a fair inference, that there may have been negligence on the part of the defendant; but he must go on and give evidence of some specific act of negligence on the part of the person against whom he seeks compensation."

I also think that there was no evidence to warrant the answer to the second question. There was nothing in the circumstance that the result of the connection which Gallagher had made did not give as good results as had been expected that led Gallagher, according to his testimony, to think that there was anything beyond the inconvenience resulting from the water not being heated to the extent that he had expected, or any danger to be anticipated, and there was nothing whatever to suggest danger to the manager. There was, therefore, I think, no duty cast upon him to have the work inspected. All that he was bound to do was what in the circumstances a reasonable man would have done; and, although it may be that if he had had an inspection made the explosion would not have occurred, I do not think that it would have crossed the mind of a reasonable man that

any danger would or might arise from the operation of the system that had been installed.

Having come to this conclusion, it is unnecessary for me to consider the question, so much debated upon the argument, as to how far and in what circumstances a person who does something which causes injury to another may escape liability because the thing done was done by an independent contractor.

An employer is not an insurer of the safety of his employees. What it is his duty to do I have already pointed out, and the full extent of his duty is to exercise reasonable care. That he may not delegate that duty means no more, as applied to the circumstances of this case, than that the respondent could not escape liability for the negligence of its manager if negligence on his part had been established.

In my opinion, the findings of the jury in answer to the second, third, sixth, and so much of the first of the additional questions as relates to the manager, should be set aside; and, for the reasons I have given, the judgment should be affirmed and the appeal dismissed with costs.

MACLAREN and HODGINS, JJ.A., concurred.

CLUTE, J.:—Appeal from the judgment of Britton, J., declining to enter judgment for the plaintiffs upon the findings of the jury, and dismissing the action without costs. The plaintiffs are the father and mother of one Jean Junor, deceased, who came to her death on the 18th May, 1913, from the effects of injuries received from an explosion in the kitchen of the International Hotel.

The deceased was head waitress at the said hotel, and at the time of her death was properly in the kitchen in the discharge of her duties.

It is charged in the claim that it was the absolute duty of the defendant to provide the said Jean Junor a safe place in which to work, and that it was the breach of such duty which caused her death; her death was caused by such wrongful act, neglect, or fault as, if death had not ensued, would have entitled her to maintain an action to recover damages in respect thereof.

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There was no executor or administrator of the deceased, and no action except this action has been brought in respect of the same subject-matter, the plaintiffs being the only persons for whose benefit such action could have been brought, if there had been an executor or administrator. This is accompanied by the usual affidavit that the plaintiffs are the only persons entitled to the benefit of the action.

The defendant, besides denying the allegations, pleads that the explosion was the result of accident for which the defendant is not responsible; that the defendant did not install the range and hot water attachments; that due diligence and care was exercised by it; that it had no technical knowledge of the construction of the range or its attachments, and relied entirely on the people from whom it purchased; that it knew of no defect in the range or attachments or system connecting the same.

It appears from the evidence that the death of the deceased was caused by the explosion of a range in the kitchen of the said defendant's hotel. The system for heating a large table used in connection with the hotel was by what is called a steam jack placed in the basement with an expansion tank above. This had worked satisfactorily, but it was thought desirable by the manager of the defendant, in order to save the expense of running the jack, to connect the system directly with the water-front of the range in the kitchen. This was done by one Gallagher, a plumber of the town, who had had some twenty odd years' experience. The substance of his evidence is as follows. He says that at the end of April, 1913, he installed the heating system in the kitchen of the International Hotel, and finished the work early in May. It was intended as a hot water heating system, to heat what is called a steam table, which heats the vegetables after they are cooked, the table forming part of the system, also the coffee urn and tea urn. Before starting the work, this table coil was heated by a steam system connected to a steam jack in the basement. The coil was two feet wide and about nine feet long, made up of three-quarter inch pipe, making the total connections with the water-front of the range about sixty feet of pipe. There was no change made in the coil or table,

which had formerly been heated by steam. This pipe, being heated to a high temperature, was surrounded by water, and the surrounding water being heated from the pipes gave out heat to keep warm the food previously cooked, and it was placed upon the table for that purpose. Under the former system it was called a steam table. The steam system was provided with a check valve and safety valve. Gallagher states that before commencing to make the change from a steam system to a water heating system, Mr. Pollock, the manager of the hotel, spoke to him, about the middle of April, and "he asked me if I could connect it up to heat the apparatus for the table; heat the table without having to fire the jack so heavy." His purpose was to have but one fire instead of two: "He said 'Can your connect that range to that table?' and I said 'Yes' and he said 'Can it be done?' and I said 'Yes, sir;,' he said 'Go ahead and do it.'"

"Q. Was there anything else said? A. Only in regard to what Mr. Maguire laid out the plant (sic) (plan) before I touched it and Mr. Pollock asked me and I shewed it to him and he said it was the very same thing.

"Q. Was there anything else said between you and Mr. Pollock at that time in April when he first spoke to you about it? A. That was the whole conversation we had; he told me, after I had explained my principle of putting it in, to go ahead, and said it was the same principle that Maguire laid out."

He then states that the range having been installed in December, the water-front not being used had burnt out, and Mr. Pollock, the manager, sent away for a new one, and the new water-front was put in, forming part of the system. It may also be mentioned that pipes found in the cellar of the hotel belonging to the defendant were also used in making the connections.

The water-front had a capacity of about five gallons of water. There were two openings, one above the other in the water-front. The flow pipe was connected with the upper one of these outlets, carried to the ceiling, across the room, and connected with the table coil, passing through the coil; the return flow was under the floor, passing back to the lower hole in the water-front, making the circuit complete. Connection was also made with

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the coffee urn and the tea urn, but that did not interfere with the circulation. The supply of water was from the city main of Sault Ste. Marie, having a pressure of about 72 pounds to the square inch. There was no expansion tank or pipe provided to the system. He had used the old check valve of the previous system in connection with the intake of the city water. After the explosion, upon examination, this check valve was found to be useless, to which I will refer again. The only other provision for safety was what is called a "pop valve." . . .

[The learned Judge then set out portions of the testimony of the following witnesses: Gallagher, Kenneth M. Perry, an expert engineer; James Killeen, a steam-fitter's foreman.]

From this evidence, I am of opinion that there was a strong case made out for the jury shewing that the system was defective and dangerous, and that the defect in the system caused the explosion and so the death of the deceased; and that the witness Gallagher, from his own statement, was incompetent. He did not seem to appreciate the danger, even after it was explained to him. How far the defendant is responsible to the plaintiffs for the installation of this defective system, under the circumstances of this case, remains to be considered.

Garnet McGuire, the travelling agent for the company from whom the defendant purchased the range, was examined. He does not profess, himself, to be an expert or to have knowledge of what was required in a system of this kind. He states that the company for whom he acts makes ranges with hot water-fronts which are used in hotels for hot water for dish washing and for heating hot water tables. He states that the range in question was purchased in September. . . .

[Extracts from the testimony of McGuire.]

The general manager, Pollock, was not called, and this evidence stands uncontradicted from a witness called by the defence.

The facts, then, as to this branch of the case, bearing upon the liability of the defendant company through its manager, may be shortly stated thus. The defendant, desiring to change its system of heating the water table and other connections, in

order to do away with the steam boiler and eliminate the expense of running it, desired to connect the coils heating the water table, etc., directly with the water-front in the range; and for this purpose the manager of the defendant, Mr. Pollock, discussed with McGuire the feasibility of attaching to the hot water-front the coil that had previously been used with the steam appliance, and McGuire told Pollock that he thought it was feasible. He said it was a job he would not undertake; and that he undertook to get information from his house, that is, from an expert of the company that he represented, in regard to the service, because he did not feel competent to advise Mr. Pollock himself. He proceeded to get this information, but there was some delay, owing to the expert being in the west, and the plan shewing how the system should be installed did not reach the defendant until after Gallagher had installed his system, and the night before the explosion. It will be seen from the evidence that this was not an ordinary case of repairing or putting in a hot water system simply. It was a proposal to utilise part of the steam system already in use by attaching it to the water-front. The evidence shews that it was usual to heat the range so that the lids would be red hot. It is a fair inference that this was known to the manager. It is hardly conceivable that a manager often out and in would not know the extent to which it was necessary to heat the range where there was cooking for a large hotel at which provision was made for seventeen tables in the dining-room. He seems to have appreciated, in the first instance, the course that should be taken in making the change, by consulting the traveller of the house from whom the range was obtained. The agent refused to advise, and thought it a matter of sufficient importance to consult an expert with the view of obtaining a plan for its installation. It was in the interview between the agent and the manager that this was arranged. The reason why the defendant did not wait for the plan was because there was some delay, and the manager applied to the local plumber without waiting for the plan of installation. In this connection it is significant that the agent McGuire states that the plan was obtained "*for instructions to plumbers and steam-fitters how to put it in.*" The manager, without waiting

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for the plan, took the chance of having the installation made without it. Having got the installation in, he knew that it did not work satisfactorily. He knew the degree to which it was usual to heat the range. He knew that water was coming in contact with the water-front when the range was heated red-hot, and that the circulation was defective, yet he took no means to find out what the trouble was, or to have an inspection.

The person whom he employed, it is now manifest, was incompetent. . . .

[The learned Judge then set out the questions given to the jury and their answers, as above.]

The trial Judge, on motion for a nonsuit, was of opinion that, if there was any liability, it was because of the answers of the jury to the third and fourth questions, and, in his opinion, there was no evidence to submit to the jury in support of these findings, and there was no evidence that want of inspection under the circumstances was negligence. It was a case where, in his opinion, the servant assumed all the risk, and, as he says, with some hesitation he dismissed the action.

With great respect, I am of opinion that there was evidence to support the answers given to all of these questions. As to question 6, it must be considered having regard to the surrounding circumstances. The fair meaning of that question is, that the manager did not exercise reasonable care in the employment of Gallagher to install the system without waiting for the plan. The plan had been sent for, but the manager had not seen fit to wait for it. Had he waited for it, and had the system been installed according to that plan, there can be no question that there would have been no accident. It seems to me impossible to say that there was no evidence to submit to the jury of the manager's negligence. The proximate cause of the accident is his negligence in directing and permitting the installation without waiting for a plan which would have made it safe. Even with the knowledge that the agent McGuire had, he would not take the responsibility upon himself of saying that the plan was feasible without communicating with the expert and getting a plan of installation. The manager saw fit to do that, to take

the risk; with the result that by the system so installed an accident was inevitable, according to the evidence.

Is there anything in law, then, upon these findings and facts, which precludes the plaintiffs from being entitled to judgment?

It is said in Halsbury's Laws of England, vol. 20, para. 234, that the master does not warrant the safety of the servant's employment, but undertakes only that he will take all reasonable precautions to protect him against accident. It is the master's duty to superintend and properly control his work in the interest of the safety of the servant, and that extends to the provision of proper and suitable plant (para. 252). A failure to maintain proper plant and equipment is equally a breach of the master's duty at common law as is a failure to provide them in the first instance: *Clarke v. Holmes* (1862), 7 H. & N. 937. "This involves a duty to inspect from time to time the plant and equipment employed in the undertaking:" Halsbury *loc. cit.*, para. 255, citing *Murphy v. Phillips*, 35 L.T.R. 477; *Tarry v. Ashton* (1876), 1 Q.B.D. 314; *Webb v. Rennie* (1865), 4 F. & F. 608.

In *Wilson v. Merry*, L.R. 1 Sc. App. 326, at p. 332, the duties of the master are stated by Lord Cairns, L.C.: "What the master is, in my opinion, bound to his servant to do, in the event of his not personally superintending and directing the work, is to select proper and competent persons to do so, and to furnish them with adequate materials and resources for the work. When he has done this he has, in my opinion, done all that he is bound to do. And if the persons so selected are guilty of negligence this is not the negligence of the master. . . . As was said in the case of *Tarrant v. Webb* (1856), 25 L.J.N.S.C.P. 261, 263, negligence cannot exist if the master does his best to employ competent persons; he cannot warrant the competency of his servants." Per Lord Colonsay (p. 344): "Culpable negligence in supervision, if the master takes the supervision on himself;—or, where he devolves it on others, the heedless selection of unskilful or incompetent persons for the duty . . . may furnish grounds of liability."

In *Canada Woollen Mills Limited v. Traplin* (1904), 35

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S.C.R. 424, Davies, J. (p. 431), quotes Lord Watson's judgment in *Smith v. Baker & Sons*, [1891] A.C. 325, at p. 356: "At common law his (the employer's) ignorance would not have barred the workman's claim, as he was bound to see that his machinery and works were free from defect." Davies, J., then proceeds: "I assume the noble Lord meant by the term 'ignorance,' as used by him, ignorance of something which he ought to have known. And at p. 362 Lord Herschell says: 'It is quite clear that the contract between employer and employed involves on the part of the former the duty of taking reasonable care to provide proper appliances, and to maintain them in a proper condition, and so to carry on his operations as not to subject those employed by him to unnecessary risk. Whatever the dangers of the employment which the employed undertakes, amongst them is certainly not to be numbered the risk of the employer's negligence, and the creation or enhancement of danger thereby engendered.' " He also quotes the law as laid down by Lord Cairns in *Wilson v. Merry*, above referred to, and proceeds (p. 432): "These oft-quoted words when applied to the branch of the law of master and servant, to which the learned Lord was addressing himself, and which he had before him in the case he was deciding, seem to cover the whole ground. It is equally clear to me that they were not intended to cover cases arising out of the master's liability for injuries caused by defects either in the system or in the condition of his premises or machinery which he either knew or ought to have known about, and of which the injured servant was ignorant."

Wilson v. Merry is referred to in *Beven on Negligence*, 3rd ed., p. 664, and the passage above given is again quoted.

In *Ainslie Mining and R.W. Co. v. McDougall*, 42 S.C.R. 420, 424, Davies, J., is reported as saying: "I hold that the right of the master, whether incorporated or not, to invoke the doctrine of common employment as a release from negligence for which he otherwise would be liable cannot be extended to cases arising out of neglect of the master's primary duty of providing, in the first instance at least, fit and proper places for the workmen to work in, and a fit and proper system and suitable materials under and with which to work. Such a duty can-

not be got rid of by delegating it to others." The head-note of the case reads: "An employer is under an obligation to provide safe and proper places in which his employees can do their work, and cannot relieve himself of such obligation by delegating the duty to another. It follows that if an employee is injured through failure of his employer to fulfil such obligation the latter cannot, in an action against him for damages, invoke the doctrine of common employment."

See also *Brooks Scanlon O'Brien Co. v. Fakkema*, 44 S.C.R. 412, where the last case was followed, and where, there being a faulty system, an incorporated company was not relieved from its responsibility by the fact that the operations were superintended by a competent foreman. *Wilson v. Merry* was again referred to; and again in *Waugh-Milburn Construction Co. v. Slater* (1913), 48 S.C.R. 609.

In that case the plaintiff's husband was employed as a line-man by the defendants, with a gang of men, setting posts in holes previously dug by another company with which they had contracted. The post-holes, so dug by the company, had been accepted by the defendants for the purposes of their contract, but they made no inspection as to their sufficiency, nor did they give instructions in regard to necessary precautions to ensure the safety of their employees engaged in setting up the posts and preparing them for the wire. Held, that the failure to sink the post-holes to sufficient depth and obtain proper filling to pack the posts, and ensure the safety of the employee required to climb it, was personal negligence on the part of the defendants, the consequences of which they could not avoid by pleading that the accident occurred through the fault of a fellow-servant.

I do not think that the defendant could avail itself of the rule in respect to common employment. There can be no doubt, upon the evidence, that there was a defect in not providing for a proper vent. This seems to have arisen from the ignorance of Gallagher. He was, in fact, incompetent. There does not appear to have been any care taken in regard to his employment. It is true that he is said to be a plumber of some years'

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experience; but here was a case where it was proposed to change what had proved to be a perfectly safe and sufficient equipment for another, unknown, method, without ascertaining whether or not it was feasible and what was necessary to make it reasonably safe. The manager started an inquiry in regard to it, but without awaiting an answer had the work proceeded with. The evidence would seem to shew that the answer came before the explosion took place, but this is not clear. The expression used by McGuire is, that "it" (the plan) "was in the mail box when I got there." Whether he meant the mail box at the post office or the mail box at the hotel, or whether the letter was addressed to him or to the defendant, does not clearly appear.

The fact that the new arrangement did not work was some evidence that there was something wrong, and from which a jury might fairly infer that it called for inquiry; and that, no action having been taken on the part of the manager by inspection or otherwise, was evidence of negligence upon his part.

One would have thought that it was a matter of common knowledge that, if no vent was provided for, there would probably be an explosion; and the fact that the water was not properly heated would indicate that the circulation was defective and that something was wrong. So far as I can see, no care whatever was taken by the manager in this proposed change to assure himself that it was practicable and safe. For an establishment of that kind it was obvious that a great degree of heat would be necessary from which steam might be generated if the pipes were not full.

I cannot agree with the trial Judge that the work done by the plumber was repair work. I think it was original construction work, in which the defendant's plant already on hand was used, supplemented by certain pipes and connections by the plumber. From the time this system was installed, the evidence shews, it was a danger to those working about it, and so contrary to the duty of the defendant by increasing the usual and ordinary risks of employment of that nature—by introducing an element of danger unknown by the employees who had to use the system, of whom the deceased was one, which was not an

ordinary or usual risk incident to the work or employment of the deceased, but was dangerous solely from its improper installation and the lack of provision for safety always necessary, and usually made in such cases. The evidence clearly supports the view that it was dangerous from the time it was installed, and that the explosion might take place at any time. This unusual risk was wholly unknown to the deceased. It was a dangerous appliance and system without the safety provision which is necessary with such appliance. I think that its installation by an incompetent workman, as Gallagher undoubtedly was, lacking the necessary knowledge to make this equipment reasonably safe, was in breach of the defendant's common law duty to the deceased, and was also a defect in the carrying on of its business and the plant used in such business, and that the defence of common employment is not permissible in this case. Gallagher was paid by the hour, but furnished a part of the equipment, and charged for the same. I am inclined to think that he was a fellow-servant, and not an independent contractor. There was no contract to do the work, except that he was called in as an ordinary plumber at so much per hour. See *Allen v. Hayward*, 7 Q.B. 960; *Saunders v. City of Toronto*, 26 A.R. 265; *Ballentine v. Ontario Pipe Line Co.*, 12 O.W.R. 273; *Walker v. McMullan*, 6 S.C.R. 241; *Fleuty v. Orr*, 13 O.L.R. 59, where many cases are collected.

But, assuming that Gallagher was an independent contractor, I do not think that relieves the defendant from liability under the evidence and facts as found by the jury.

Valiquette v. Fraser (1904), 9 O.L.R. 57, was referred to by the defendant's counsel, but that case is distinguishable upon this ground: it was there held that an owner had a right in building operations to rely on the plans of a qualified architect and the skill of competent builders, and was not bound at his peril to acquire the technical knowledge necessary to enable him to do the work; in this case a plan was called for, and a proper plan prepared, but it was not used, the installation having taken place before it arrived, and the man engaged by the defendant was, according to the evidence, undoubtedly incompetent.

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Woods v. Toronto Bolt and Forging Co., 11 O.L.R. 216, referred to by the learned trial Judge, differs materially from the present case. There, the immediate cause of the explosion was that the water in the boiler had been allowed to become too low, owing to the valve which regulated the supply having been closed. It was the duty of the water tender, who was killed by the explosion, to attend to the valve and see that a sufficient supply of water was maintained. The boiler was built by reputable makers, and there was nothing to shew that it had not been built of good material or had become worn out, except as to the "pet-cock" at the foot of the glass gauge. The plaintiff, while in the employ of the defendants, an incorporated company, was injured by the explosion. It was held that there was no evidence of negligence proper for the jury upon the question of the valve. There was evidence for the jury that the water tender was incompetent when employed, and remained incompetent and negligent in the discharge of his duty, and that the defendants' officials had been amply warned thereof, and were negligent in retaining him; but, there being no finding and no evidence that these officials were themselves incompetent, their negligence in carrying on operations could not be imputed to the defendants. *Wilson v. Merry* was referred to as laying down the law by which the Court in this country is bound. Failure to repair the pet-cock was negligence for which the defendants were answerable under the Workmen's Compensation for Injuries Act. The main distinction between that case and the present is, I think, that there the installation was right, but there was negligence in the man who had charge of the plant; the plaintiff was therefore confined to such damages as were recoverable under the statute.

In *McArthur v. Dominion Cartridge Co.*, [1905] A.C. 72, the jury found that the explosion occurred through the neglect of the defendant company to supply suitable machinery or take proper precautions, and that the resulting injury to the plaintiff was in no way due to his negligence. The judgment of the Supreme Court of Canada was set aside and the verdict of the jury sustained, Lord Macnaghten, after pointing out that the func-

tion of the Court under the Civil Procedure Code in Quebec is the same as the function of a Court of Appeal in England, said: "It is not the province of the Court to retry the question. The Court is not a Court of Review for that purpose. The verdict must stand if it is one which the jury as reasonable men having regard to the evidence before them might have found, even though a different result would have been more satisfactory in the opinion of the trial Judge and the Court of Appeal."

The principle of the decision in that case seems to cover the present. The system was incomplete, and no proper precautions, without which danger was imminent, were taken.

With deference, I think the judgment directed to be entered for the defendant should be set aside, and judgment entered for the plaintiffs, for the amounts found by the jury.

Appeal dismissed; CLUTE, J., dissenting.

[MEREDITH, C.J.C.P.]

ACKERSVILLER V. COUNTY OF PERTH.

Highway—Nonrepair—Injury to Traveller—Road Assumed by County Corporation—Highway Improvement Act, 7 Edw. VII. ch. 16 (O.)—Duty to Repair and Maintain—Negligence—Absence of Guard-rail at Dangerous Place—Liability of County Corporation—Limits of Road Assumed—By-law—Construction—"Concession"—Damages—Costs.

In an action brought against the municipal corporations of a county, two townships, and a city, to recover damages for personal injury to the plaintiff and injury to his motor car, by reason, as he alleged, of the negligence of the defendants, or some or one of them, in not placing and maintaining a guard-rail or other protection at a place upon a highway where a ditch had been made and a culvert built, so that when the plaintiff backed his car upon the highway it ran into the ditch, and the injuries complained of followed, it was *held*, upon the evidence, that the defendant county municipality owed a duty to the plaintiff, and to all other persons lawfully travelling upon the road in question, to provide some efficient guard against the accident which happened, and all like accidents arising from the danger which the unguarded ditch created; the neglect of that duty was the proximate cause of the accident and of all the injury which was the result of it; and that, if there were any negligence on the part of the plaintiff, it was not a proximate cause of the accident, nor was it contributory negligence disentitling the plaintiff to recover.

The statute-imposed duty of a municipality in regard to the care of highways is to keep them in repair. The Highway Improvement Act, 7 Edw. VII. ch. 16 (O.), under the provisions of which the defendant county

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municipality assumed the road, adds the word "maintain," but unnecessarily, for to keep in repair includes maintenance; and keeping in repair includes renewal. A municipality must, having regard to its means, keep the roads under its control in a state reasonably sufficient for the requirements of the traffic over them.

In one part of the county by-law assuming the road, it was described as "across the 3rd, 4th, 5th, and 6th concessions;" and in another as "facing" the same concessions:—

Held, that the interpretation put upon the by-law by all the municipalities should be adopted, that is, that it covered the whole of the road in question to the middle line of the intersecting road, and so included the place in question; but, if that were not so, the defendant county municipality were liable as wrongdoers for constructing the culvert and making the ditch and road at the place aforesaid.

Semble, that the "lines" or roads between concessions, being frequently spoken of as "concessions," may have been referred to in the by-law; and, besides, the concession proper may extend to the middle line of the road upon which it fronts. See secs. 17 and 33 of the Surveys Act, R.S.O. 1914, ch. 166.

And *held*, that the plaintiff was entitled to recover from the defendant county municipality damages for the injuries he sustained in the accident, with the costs of the action; and that the other defendants were entitled to have the action dismissed as to them, but without costs.

The plaintiff's damages were assessed at \$1,000.

ACTION to recover damages for personal injuries sustained by the plaintiff and for injury to his motor car, by reason, as he alleged, of the negligence of the defendants, the Corporations of the County of Perth, the Townships of Downie and South Easthope, and the City of Stratford, in failing to keep a highway in repair.

December 1. The action was tried by MEREDITH, C.J.C.P., without a jury, at Stratford.

R. T. Harding and *M. G. Owens*, for the plaintiff.

G. G. McPherson, K.C., for the defendants the county and township corporations.

R. S. Robertson, for the defendant city corporation.

December 7. MEREDITH, C.J.C.P.:—If the plaintiff can recover damages in this action at all, it can be only on the ground that the defendants, or some of them, owed a duty to him, in common with all other persons making a lawful use of the highway in question, to have placed some guard, at the place where the accident happened, which would have been sufficient to have prevented it.

During the hearing of the plaintiff's case, a case of negligence in the sense of want of repair, in the more common mean-

ing of that expression, seemed to be developing, in this way: that after the construction of the culvert, at the place where the accident happened, the bank of the road, on both sides of the culvert, had been allowed to wear away until the end of it extended about 18 inches beyond the receded bank; but the whole evidence in the case makes it clear that that was not so, that, as originally planned and constructed, the culvert was to, and did, extend 18 inches beyond the bank: so that the plaintiff can succeed, if at all, as I have said, only on the ground first mentioned.

The main facts of the case are plain; I have no doubt about them: the plaintiff had proceeded in his motor car along the highway which forms the boundary line between the city of Stratford and one of the two defendant townships, until he had reached, and just crossed, the highway in question, which runs between the said two townships to the place in question, whence it runs into the city of Stratford. Having reached that point, the plaintiff stopped, and then backed into the highway in which the accident happened, with a view to turning around and going back on the same highway by which he had come. In thus backing around he reached the edge of the bank at the culvert, on the left hand side of the road, with the result that the car turned over into the ditch; he went too far on that tack, thereby making the drop into the ditch inevitable. Nothing, as I find, depended on the width of the road or its condition in any respect, except that there was no device of any kind to prevent anything or any one going into the ditch if it or he went far enough in that direction: if the road had been adamant, and extended to the end of the culvert—another 18 inches—I have no manner of doubt that the plaintiff would have gone over the bank, and have gone over without the little chance that the wheel beginning to sink on the edge of the soft earth gave him to recover ground by a swift forward movement. The night was dark; the man had no means of seeing just where he was, even if he had looked behind; his one guide was his position as indicated by the light of the lamps of his car thrown upon the road in front of him; he had not, I find, completed his intended backward turn, when the sinking of the wheel indicated his

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danger: then, I am satisfied, he applied the powerful lever brake, called the emergency brake, which was found, after the accident, to be firmly set; but then it was too late; the car was then on too frail ground for any such action to save it; the only chance, if there were indeed any, was immediate forward movement.

I do not find it necessary to say whether the plaintiff really made the mistake of pressing with his foot the "speed accelerating" foot lever, instead of the foot brake, whilst the car was still going backward, as two apparently quite credible witnesses testified that he had immediately after the accident informed them was the fact and cause of the accident; for, even so, and even if it were held that that was negligence on his part, it would have had no serious consequence had there been a reasonably sufficient guard, in the shape of a coping, rail, or anything else, at the side of the road where the accident happened: contact with any such guard would have caused the car to be stopped without any kind of danger of its going over the bank, after jumping it, or breaking it down. Then was there a breach of duty on the part of any of the defendants in having failed to provide such a guard there?

Before answering that question, it is better to consider which of the defendants is liable, if there has been any liability, because it may be that, if the Municipality of the County of Perth were charged with the repair of the part of the road in question, more might be required, in the construction and repair of the road, than if the duty rested upon all or any of the other municipalities. Then which, if any of them, was so charged?

That the defendant county municipality "assumed" the road in question, under the provisions of the Highway Improvement Act, 7 Edw. VII. ch. 16 (O.), in the year 1907, and have ever since had control of it, as a county road, under the provisions of that enactment, is admitted on all hands; but this municipality contend that the road in respect of which they are answerable for "maintenance and repair" does not quite extend to the place where the accident happened. The place where the accident happened, they assert, is close to, but just beyond, the northerly limit of the road assumed by them; that they "as-

sumed" the road only as far as the southerly limit of the cross-road which lies between the city of Stratford and the two defendant townships; and in support of that contention they point to the provisions of the by-law under which the road was assumed—by-law No. 414, passed on the 6th day of June, 1907.

But the language employed in that by-law is by no means as definite, clear, and unambiguous as these defendants assert. In one place the road assumed is described as "across the 3rd, 4th, 5th, and 6th concessions;" and in another as "facing the 3rd, 4th, 5th, and 6th concessions."

It is well known that the "lines" or roads between concessions are quite commonly spoken of as concessions. The much more common expression is, I am sure, "I live *on* the third concession," having reference to the concession line, not the concession between the concession lines, than the expression "I live *in* the third concession." And I am not prepared to say, notwithstanding the legislation vesting in the Crown or the municipalities the soil or freehold of the land under the highway, that, accurately and technically speaking, the concession may not extend to the middle line of the road upon which it fronts. No legislation, that I am aware of, settles the question. Section 17 of the Surveys Act, R.S.O. 1914, ch. 166, refers to width, not depth; and "front posts" on "front angles" are terms hardly applicable to concession lines: see sec. 33.

But, however that may be, I have no doubt that I may, as I do, adopt the interpretation which all the municipalities concerned have from first to last, without question or doubt, put upon the by-law, that is, that it covers the whole of the road in question to the middle line of the intersecting road, and so includes the place in question. Upon that view of it, the county took possession and have ever since controlled the road up to that line: they built the culvert and made the bank where the accident happened. This point now made for the first time is a lawyer's point, first discovered in a lawyer's office, and one which would never have been mooted except for this action. In my opinion, these defendants are not entitled to succeed upon it.

But, if they were, then they had no right to construct the cul-

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vert or make the ditch or road at the place in question, and are answerable as wrongdoers: they cannot be less liable for making a dangerous place in a highway, without having any authority over it, than for the same thing done under colour of their duty to repair.

This brings me back to the one substantial question in the case: Were the defendants, or any of them, guilty of negligence in regard to the plaintiff in not having placed an efficient guard of some kind at the side of the road at the place where the accident happened?

The statute-imposed duty of a municipality in regard to the care of highways is to keep them in repair: the Highway Improvement Act adds the word "maintain," but unnecessarily, as it seems to me, for to keep in repair necessarily includes maintenance, whilst maintenance does not necessarily include all that must be done to *keep* in repair: in other words, a road, or anything else, may be maintained, though not in a sufficient state of repair; and keeping in repair necessarily includes renewal; and so it is that, under the one word, whilst a blazed line through the woods may be a sufficient state of repair under some circumstances, nothing short of the best of road construction will do under other circumstances. The statute does not say that any municipality shall pave its streets, but it says that which necessarily compels pavement where pavement is needed: the municipality shall keep the road in repair; and where the traffic is great that injunction can be obeyed only, in places of great traffic, by the construction of paved ways. That is, as it seems to me, quite plain; and has been, as I have always understood it, the law in this respect as it has always been administered in this Court. But that duty may be limited by the money means which the municipality has; and that is not Court-made law: another statute limits the money-raising power of every municipality: the two statutes are of equal authority and must not be interpreted to conflict with one another; hence it is commonly said, with substantial accuracy, that the municipality must, having regard to its means, keep the roads under its control in this respect, in a state reasonably sufficient for the requirements of the traffic over them.

That is an obligation necessarily increasing with the settlement and improvement of the country; but one which has hardly kept pace with them, as such legislation as the Highway Improvement Act, "good roads" agitations, and many other things, indicate; and it was just because of this state of affairs that the defendant county municipality assumed the road; that municipality deemed that the road was not as good as it should be under the township municipalities' control, and so the county assumed control over it for the purpose of making it a better road—improve it—at the cost of the county, with very substantial assistance out of the funds of the Province.

It was an important road with a good deal of traffic over it, as the action of the county municipality in assuming it, and the fact that the place in question is a place of junction of the whole four defendant municipalities, shew. And at this place the defendant county municipality made a ditch, four feet deep, with a culvert, four feet in height, running into it, and left the ditch without any guard-rail or other protection against person, animal, or vehicle going over the bank into it—an obviously dangerous exploit, especially in the case of a heavy carriage such as the plaintiff drove over it.

Something was said during the trial of the action in regard to the weeds which were allowed to grow up in the ditch so high and so thick as to make the danger less observable, if not quite unobservable, at some times; but, though evidence of negligence, and negligence of a harmful kind from another point of view, as the growth was said to be largely of Bokara clover, I was then of opinion, and still am, that that negligence had no part in the plaintiff's injury, because it was too dark for him to be misled in any way, by the growth, at the time of the accident; and he had not at any earlier time been misled by it, as to the character of the ditch; on the contrary, he admitted that he knew of the existence of the ditch and of the culvert—which he called a bridge—there. If evidence at all, it could be evidence only of general neglect of this child of the county's adoption, adopted because those who had the care of it before had not brought it up to a high enough standard; but that I disregard, as immaterial in the circumstances of this case.

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For the plaintiff, two civil engineers testified, in effect, that proper construction of the culvert required a "wing wall" on each side of the culvert—so as to retain the bank—carried up above the bank a sufficient height to form an efficient guard against vehicles going off the road into the ditch. On the contrary, for the defendants, the county engineer testified to a preference for the extension of the culvert 18 inches beyond the bank, to the "wing walls." These conflicting views I reconcile thus: the county engineer's mind was set too much on the "life" of the road, and on keeping down cost of construction and repair; whilst the minds of the other two witnesses were, perhaps, too much set upon the facts of this particular case, and the lives of persons, animals, and vehicles passing over the road.

There was no evidence that, if it were the duty of those charged, or undertaking, the repair of this road, to guard all such ditches as this, it would be a task too onerous; but I am aware—it is common knowledge—that to require a guard-rail, or other like protection, in all places where injury might be sustained by driving off the road into the ditch, would be an absurd exaggeration of the duty to keep the roads in repair, and would possibly lead to nothing being done, it being more profitable to "take chances," to "run the risk," than go to so great expense; for, with country roads, such as they generally are, and with the first law of nature in their aid, injuries arising out of accidents upon them are not, and are not likely to be, very numerous.

It may be, indeed it must be, difficult to draw the line between the place that must be and that which need not be guarded, in order to keep a highway in repair. Different places have their different circumstances, and each must be dealt with as it arises; dealt with, not according to the notion of the particular Judge before whom it is tried, but according to the evidence; but where a municipality, in order more easily to perform their duty to repair, raise the road, or lower the ditch, so as to create a substantial danger, I would, generally speaking, find it to be their duty reasonably to guard it.

Upon the evidence adduced in this case, I find that the defendant county municipality owed a duty to the plaintiff,

and to all other persons lawfully travelling upon the road in question, to provide some efficient guard against the accident which happened, and all like accidents arising from the danger which the unguarded ditch creates; that neglect of that duty was the proximate cause of the accident and of all the injury which was the result of it; and that, if there were any negligence on the part of the plaintiff, it was not a proximate cause of the accident, nor was it contributory negligence disentitling the plaintiff to recover in this action.

It is proved that "wing-walls," built up so as to have afforded ample protection, would have cost but from \$30 to \$35, and, as I have said, there is no evidence that this wealthy county would have been hampered, in any money sense, if it had expended that sum at the place in question, and any other sums of money required to give the like protection in all other places, if any, requiring it, upon any of the highways which this municipality is statute-bound to keep in repair.

The plaintiff is, accordingly, entitled to recover from the defendant county municipality damages—reasonable compensation under all the circumstances of the case—for the injuries he sustained in the accident; and the other defendants are entitled to have this action dismissed as to them.

In regard to damages: the plaintiff's motor car was much injured; the bill for repairing it is \$298; and the plaintiff himself sustained painful bodily injuries: he was in the hospital for a week; it was nearly two months before he went to work again; he has not yet quite recovered from all the ill effects of his injuries; and the medical gentlemen, who testified in his behalf, expressed the opinion that he is under some permanent physical disability, caused by the accident, which "will be stationary from now on:" this they attribute to some injury to some nerves of the spine; but it is not said that he is hampered by it in his business of driver of a motor car for hire; and before the accident he was advised to give up his occupation of teamster because of disability which was attributed to lumbago; and gave it up accordingly. This ailment, in his back, had been of so severe a character that his medical adviser had sent him to London for a more thorough examination than could be had where he

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was; the result is said to have been that nothing more than lumbago was discovered, though the seachlight of X rays was employed in the diagnosis.

The plaintiff's expenses at the hospital and for medical advice and treatment for his injuries sustained in this accident were altogether \$41; and, as I have said, his pain and suffering were considerable.

After his car was repaired, there was no reason why it might not have been employed in his business; drivers of such cars are numerous and obtainable for reasonable wages. The business of owner and driver, as the plaintiff is, of a touring car, cannot be a very profitable one.

I assess the plaintiff's damages at \$1,000; made up of these items: actual outlay, \$350; the items I have mentioned amount to \$339, but there must have been other small expenses, not enumerated, for which the additional \$11 are allowed: there is not sufficient evidence to enable me to allow any damages for unrepaired and unrepairable injury to the car; it would be quite too speculative and uncertain to add anything for this. I positively refuse to guess at any substantial damages. \$150 for loss of earnings; about \$3 a day net; which under all the circumstances of the case seems to me to be enough; and \$500 for personal injury, including "pain and suffering:" I am hopeful, and satisfied, upon the whole evidence, that the plaintiff is already very little worse in health and physical strength than before his accident; and that, before long, he shall be as well as he would have been had there been no such accident.

There will be judgment for the plaintiff against the defendants the Corporation of the County of Perth, and \$1,000 damages, with costs of action; in other respects the action will be dismissed, without costs.

If any party desire it, there will be the usual stay of proceedings, upon this judgment, for 30 days.

[MIDDLETON, J.]

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Domicile—Change—Evidence—Onus—Marriage—Quebec Law—Holograph Will—Revocation—Intestacy

The domicile of origin is not to be treated as abandoned upon slight evidence. The onus is upon those asking the Court to determine that a new domicile has been chosen, to satisfy the Court that there has been an actual intention on the part of the individual to abandon his domicile of origin. Acts, events, and declarations, subsequent to the time at which a domicile has been chosen, are admissible in evidence to shew what the intention was at that time.

And *held*, upon the evidence, that S., whose domicile of origin was in the Province of Quebec, was at the time of his decease domiciled in the Province of Ontario, and had become so domiciled at a time previous to his marriage on the 1st June, 1910; that upon his marriage a holograph will made by him in Quebec, dated the 16th February, 1909, became revoked; and, it not being shewn that any other will was ever executed in accordance with the laws of Ontario, S. died intestate, and the plaintiff, as his widow, was entitled to letters of administration of his estate in Ontario. Review of the authorities.

Udny v. Udny (1869), L.R. 1 Sc. App. 441, *In re Grove* (1880), 40 Ch. D. 216, and *In re Martin, Loustalan v. Loustalan*, [1900] P. 211, specially referred to.

ISSUES arising out of a contestation in a Surrogate Court, transferred to the Supreme Court of Ontario, were ordered to be tried.

October 29, 30, and 31. The issues were tried by MIDDLETON, J., without a jury, at Ottawa.

H. H. Dewart, K.C., and *A. Haydon*, for the plaintiff.

Travers Lewis, K.C., for the infant defendants.

J. A. Ritchie, for the adult defendants.

December 7. MIDDLETON, J.:—This matter originated in the Surrogate Court of the County of Carleton, but has been transferred to the Supreme Court of Ontario, and issues have been directed to be tried for the purpose of determining: (1) the domicile of the deceased Gustavus Otto Seifert, at the time of his death on the 4th December, 1913; (2) the domicile of the deceased at the time of his marriage on the 1st June, 1910; (3) whether a certain holograph will, dated the 16th February, 1909, ought to be admitted to probate; and (4) whether the de-

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ceased died intestate, and letters of administration should issue to the plaintiff, his widow.

Undoubtedly the domicile of origin of the deceased was the city of Quebec. There his parents resided and his youth was spent. The parents of the deceased resided there for many years and until their death. In his early years Otto Seifert took part in his father's business, and lived with his father. Some 13 or 14 years ago he gave up his interest in his father's business, and about the same time became interested in a steam-laundry business which he established and carried on in the city of Quebec. In 1901, he also started a steam-laundry business in the city of Ottawa. He continued to carry on both businesses until his death. Prior to his marriage, he continued his home in Quebec, although he was necessarily a good deal at Ottawa in connection with the important business he carried on there.

I do not know that anything would be gained by endeavouring to ascertain the proportion of the time Mr. Seifert spent in one place or the other prior to that event. Suffice it to say that up to a time shortly before the marriage there is nothing from which a change of domicile could be inferred.

On the 1st June, 1910, Mr. Seifert married Miss O'Sullivan. The marriage took place at the city of Ottawa. Miss O'Sullivan had her domicile of origin and residence also at Quebec. She was a Roman Catholic; Mr. Seifert was a Methodist; and it was intended that upon her marriage she should accept her husband's religious faith.

In the Province of Quebec doubt has been raised as to the validity of a marriage of a Roman Catholic and a Protestant. The abandonment by a wife of the Catholic faith is not looked upon with favour. The community in Quebec is largely Catholic. For these reasons, and possibly for other reasons, the wife now says that it was stipulated, and was a condition of her assent to the marriage, that not only should the ceremony take place in Ottawa, but the future home should be there. I see no reason to discredit this statement; in fact, everything points to its accuracy; and, if it is necessary that this statement should be corroborated, I think it is sufficiently corroborated by what took place.

Prior to the marriage, Mr. Seifert leased a furnished house in the city of Ottawa, and added to its furnishings. Miss O'Sullivan came there, and stayed at the house while preparing for her marriage, accompanied by Mr. Seifert's sister; Seifert himself continuing to reside at the hotel where he had stayed while in Ottawa. Upon the marriage taking place, Mr. and Mrs. Seifert resided in this house. Subsequently another house was rented. More lately this house was purchased, and became the Seiferts' home until shortly before his death, when he purchased another residence at Britannia, a suburb of Ottawa. Death came suddenly and unexpectedly on the 4th December, 1913.

Although Mr. Seifert and his wife spent the summer following the marriage in the Province of Quebec, their residence there was temporary and in the nature of a visit; and, apart from this visit, the matrimonial home has always been in Ottawa, in the premises rented and owned by the husband. On several occasions, owing to the condition of Mrs. Seifert's health, she was away from this home for several months; but these absences were of the nature of visits merely. Mr. Seifert was also away from Ottawa and in Quebec on different occasions in connection with the Quebec business; but from the time of the marriage onward there was no difficulty in accepting the view that Ottawa had become his home.

This, however, is not the point of difficulty in the case. The question of domicile at the date of the marriage is the critical and important question.

According to the law of the Province of Quebec, a testator may validly make a holograph will. On the 16th February, 1909, Mr. Seifert, then not having matrimony in view, executed a holograph will, by which substantially all his estate is divided equally between his surviving brothers and sisters. According to the law of Quebec, upon marriage a will is not revoked, but where the marriage takes place, as here, without a marriage settlement, a community of property is established which secures to the surviving spouse a share of the assets of the community. If the matrimonial domicile is the Province of Quebec, then Mrs. Seifert would be entitled to receive, speaking generally, half of her husband's property. If, on the other hand, the domicile was

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in the Province of Ontario, then marriage would, by virtue of the Ontario law, revoke this will, and the widow and infant children would take, to the exclusion of the brothers and sisters. The contest is thus between those taking under the holograph will on the one side, and the widow and children on the other; the widow preferring to allege an intestacy instead of a community.

This holograph will has been admitted to probate by the Superior Court of the Province of Quebec. It is admitted by all counsel concerned that this judicial act is not conclusive upon me, as apparently a probate in the Province of Quebec differs widely from the proof of a will before a Surrogate Court in the Province of Ontario; probate issuing there as a matter of course upon the filing of a petition and an affidavit shewing the due execution of the will.

A good many facts were established in evidence, some pointing towards a Quebec domicile, some pointing towards a domicile at Ottawa, e.g., the lease of the Waverly street house immediately before the marriage, in which Seifert is described as of the city of Quebec, in the Province of Quebec; the declaration filed under the Partnership Act on the 25th November, 1902, in which Mr. Seifert is described as of the city of Ottawa, in the county of Carleton; but these appear to me to afford little assistance. Of greater value is the affidavit made for the purpose of obtaining a marriage license, in which Mr. Seifert not only describes himself as of the city of Ottawa, in the county of Carleton, but in which he states that he has had since May, 1902, his usual place of abode within the city of Ottawa. I do not regard this as indicating that Seifert was domiciled at Ottawa from 1902, the time when he established the laundry business there, but it appears to me to go far to confirm the statement that in 1910 he had definitely made up his mind, at a date antecedent to the actual marriage, to claim Ottawa as his usual place of abode; and in this respect the statement made by the wife receives very substantial confirmation.

In attaching this value to the evidence, I have present to my mind the decision of the Supreme Court of Canada in *Wadsworth v. McCord* (1886), 12 S.C.R. 466, where it was held that

a description attributing residence in an *acte de mariage* has only relation to the residence necessary to permit of a marriage lawfully taking place.

Having reached this conclusion upon the facts, it is perhaps unnecessary that I should say anything with reference to the views I take as to the law relating to change of domicile; but I think it better to set forth these views, to shew that the opinion I have expressed has been formed in the light of the decided cases, so that if in any respect I am in error, and if this error has influenced my conclusion, I may be the more readily set right.

In the evolution of the English law relating to the acquisition of a domicile of choice, the distinction between domicile and national allegiance has not always been borne in mind; and, although the English law must now be regarded as well settled, occasionally expressions are found indicating a tendency to revert to the earlier period in which the factor of national allegiance took too prominent a place.

The Scotch case, *Udny v. Udny* (1869), L.R. 1 Sc. App. 441, contains still the most authoritative exposition of the law. Domicile of choice is the creation of the party. A man may change his domicile as often as he pleases, without changing his allegiance. To suppose that for a change of domicile there must be a change of national allegiance is to confound the political and the civil status, and to destroy the distinction between *patria* and *domicilium*. The domicile can be changed, as put by Lord Hatherley (p. 449), "by the choice of another domicile, evidenced by residence within the territorial limits to which the jurisdiction of the new domicile extends. He, in making this change, does an act which is more nearly designated by the word 'settling' than by any one word in our language." Lord Westbury states the law in very similar terms (p. 458): "Domicile of choice is a conclusion or inference which the law derives from the fact of a man fixing voluntarily his sole or chief residence in a particular place, with an intention of continuing to reside there for an unlimited time. This is a description of the circumstances which create or constitute a domicile, and not a definition of the term. There must be a residence freely chosen."

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“Domicile” has been described as equivalent to “home” (Phillimore’s International Law, 3rd ed., vol. 4, p. 45). It follows from this that the same principles apply in determining whether there has been a change of domicile when the suggested change is from one sovereignty to another sovereignty, and when the change is from one part to another of the same dominion; but it appears to me that some of the facts relied on in some of the cases possess more cogency when applied to a change which would ordinarily be accompanied by an abandonment of the original allegiance than when the allegiance remains the same. This is particularly so where the fact relied upon is the exercise of the political right of voting.

All the cases point out the facts that the domicile of origin is not to be treated as abandoned upon slight evidence. The onus is clearly upon those asking the Court to determine that a new domicile has been chosen, to satisfy the Court that there has been an actual intention on the part of the individual to abandon his domicile of origin. It is not necessary to multiply citations in support of this. The cases are well collected in the Supreme Court decision already referred to and in the later case of *Jones v. City of St. John* (1899), 30 S.C.R. 122.

Marchioness of Huntly v. Gaskell, [1906] A.C. 56, puts this point clearly: “The abandonment or change of a domicile is a proceeding of a very serious nature, and an intention to make such an abandonment must be proved by satisfactory evidence.”

To the same effect is *Winans v. Attorney-General*, [1904] A.C. 287.

The view expressed by Lord Westbury has been adopted and followed by Sir W. M. James in *Haldane v. Eckford* (1869), L.R. 8 Eq. 631, and by Sir John Wickens in *Douglas v. Douglas* (1871), L.R. 12 Eq. 617, and by the Court of Appeal in *In re Grove* (1888), 40 Ch. D. 216.

The latter case is of value here as establishing the proposition that acts, events, and declarations, subsequent to the time at which a domicile arises, are admissible in evidence upon that question, when they indicate what the intention was at a given time.

Applying the law as laid down in all these cases and in many others to which I have referred and carefully read, I have come to the conclusion that here the deceased, before his marriage, determined to make his home in the Province of Ontario, and that he elected to change his domicile from Quebec to Ottawa, and that in the renting and furnishing of the house in Ottawa he had given effect to this intention, so that the new domicile was gained *animo et facto*. Ottawa became his home. There he lived with his wife and children. Some evidence was given shewing that Mr. Seifert had entered into negotiations looking towards the purchase of the family house in Quebec. This, I think, does not displace the intention to remain in Ottawa as his permanent home. It may indicate that at the time these inquiries were made there was a half-formed intention to abandon the domicile of choice he had then acquired; but, as nothing came of the overtures then made, there was no abandonment of the domicile of choice.

This brings the case precisely within the decision in *In re Martin, Loustalan v. Loustalan*, [1900] P. 211.

The provision of the statute of Ontario by which the marriage revoked the will formed part of the matrimonial law, and not of the testamentary law, and operated here to revoke the will executed in the Province of Quebec. This will was valid at the time it was executed, and, for aught I know, it may yet remain valid so far as the Province of Quebec is concerned, for I do not know whether that Court follows the law of domicile in dealing with the administration of the effects of deceased persons: but that question will have to be determined by the Courts of Quebec according to the Quebec law. The case just referred to is also of great value upon the question first discussed.

I therefore find, upon the issues submitted, that at the time of the death of the deceased he was domiciled in the Province of Ontario, and that he became domiciled in Ontario at a time prior to the marriage of the 1st June, 1910; that upon the marriage the holograph will dated the 16th February, 1909, became revoked; and, it not being shewn that any other will was ever executed in accordance with the laws of the Province of Ontario,

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the deceased died intestate, and the plaintiff, as his widow, is entitled to letters of administration of the estate of the deceased in Ontario.

The costs of all parties may, I think, be paid out of the estate of the deceased.

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Partnership—Account—Profits of Separate Business Carried on by one Partner—Assent of other Partner—"Competing" Business—Evidence—Sale of Property of Firm after Death of one Partner—Bona Fides of Purchaser—Assistance Given by Surviving Partner—Liability to Account for Profits on Resale—Compensation to Surviving Partner for Services in Liquidation—Trustee—Trustee Act, R.S.O. 1897, ch. 129, sec. 40—Application of 1 Geo. V. ch. 26, sec. 66.

(1) A partner must account to his firm for the profits made by him in any business of the same nature as and competing with that of his firm if he carries on any such business without the consent of his partners; but *held* (HODGINS, J.A., dissenting), affirming on this point the judgment of MIDDLETON, J., 26 O.L.R. 246, that, assuming that the business carried on by the defendant in Michigan was of the same nature as and competing with the partnership business carried on by the defendant and his brother, since deceased, the evidence established that it was carried on with the consent of the latter.

Per HODGINS, J.A.:—The business carried on in Michigan was a competing one. Competition in fact is not the final test, but rather the sameness of the business as transacted with that being carried on by the main concern. The business carried on in Michigan was within the scope of the partnership business, the dealings were with the same customers in the same commodities, and the business competed with the firm in sales. Not merely knowledge on the part of the deceased partner that the competing business was being carried on should be shewn, but acquiescence or assent to its being carried on for the benefit of others; and the evidence failed to shew that the deceased partner consciously agreed to what was being done.

(2) There was no evidence of any consent by the defendant's brother and partner to the defendant engaging in the W. H. & Co. business on his own account; and the judgment of MIDDLETON, J., as to this, was reversed.

(3) There was nothing wrong in morals or law in the defendant providing the money which the purchaser of a certain oil mill property of the partnership required to enable him to acquire the property and carry on the business. A surviving partner, who lends his credit to a *bona fide* purchaser of partnership property, is not to be treated, for that reason, as the real purchaser, even though the purchase would not and could not have been made but for the lending of his credit. And the conclusion that the defendant was the real purchaser of the business was unwarranted. The judgment of MIDDLETON, J., in regard to the liability of the defendant in respect of the oil mill property, was affirmed (HODGINS, J.A., *dubitante*), but upon a different ground.

(4) The defendant was not entitled to compensation for his services as surviving partner in winding up the affairs of the partnership—he was not a trustee, not even an implied or constructive trustee, and did not come within the provisions of the Trustee Act; even if he were an implied or constructive trustee, he would not come within sec. 40 of R.S.O. 1897, ch. 129; and *quære*, whether sec. 66 of 1 Geo. V. ch. 26, which came into force on the 1st June, 1911, would be applicable to his services before that date. The judgment of MIDDLETON, J., upon this point, was affirmed.

Know v. Gye (1872), L.R. 5 H.L. 656, *Farrar v. Farrars Limited* (1888), 40 Ch. D. 395, and *Omnium Electric Palaces Limited v. Baines*, [1914] 1 Ch. 332, specially referred to.

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APPEAL by the plaintiffs and cross-appeal by the defendant from the order of MIDDLETON, J., 26 O.L.R. 246.

December 16, 17, 18, and 19, 1913, and January 26 and 27, 1914. The appeal and cross-appeal were heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, J.J.A.

Wallace Nesbitt, K.C., H. S. Osler, K.C., and Christopher C. Robinson, for the plaintiffs. The judgment of the learned referee should be followed as regards the Yale business, to which the rule laid down in *Aas v. Benham*, [1891] 2 Ch. 244, is applicable: see especially at p. 255, *per* Lindley, L.J., and his discussion there of *Dean v. MacDowell* (1878), 8 Ch. D. 345. They referred to the *Dean* case at pp. 351, 353, 354, 355, 356; Pollock on Partnership, 8th ed., pp. 92-94; 30 Cyc. 454, 461 (B 7); *Mitchell v. Lister* (1891), 21 O.R. 318, 321, where Robertson, J., went astray in his application of the *Dean* case; Lindley on Partnership, 8th ed., p. 376; *Gardner v. McCutcheon* (1842), 4 Beav. 534; *Lock v. Lynam* (1854), 4 Ir. Ch. R. 188; *Somerville v. Mackay* (1810), 16 Ves. 382; *Burton v. Wookey* (1822), 6 Madd. 367; *Miller v. MacKay* (1862), 31 Beav. 77; *Shallcross v. Oldham* (1862), 2 J. & H. 609; *Russell v. Austwick* (1826), 1 Sim. 52. It is submitted that the defendant is liable to account by reason of his use of the firm name and property of J. & J. Livingston in connection with the Yale business, and also by reason of that business being of the same nature as and a competing business with that of J. & J. Livingston. Reference was also made to *Fox v. Mackreth* (1788-91), 2 Bro. C.C. 400, 405, also in 2 Cox Eq. 320, and 4 Bro. P.C. 258; *Ex p. Lacey* (1802), 6 Ves. 625; *Randall v. Errington* (1805), 10 Ves. 423; *Bowes v.*

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City of Toronto (1858), 11 Moo. P.C. 463, 517-520; *Re Iron Clay Brick Manufacturing Co.* (1889), 19 O.R. 113, 121; *Miller v. Hand* (1912), 4 O.W.N. 245, 247; *Morrison v. Watts* (1892), 19 A.R. 622; *Hardwicke (Lord) v. Vernon* (1799) 4 Ves. 411; *Thompson v. Clarkson* (1891), 21 O.R. 421; *Atkinson v. Casserley* (1910), 22 O.L.R. 527; *Bray v. Ford*, [1896] A.C. 44, 48, 51; *Salomons v. Pender* (1865), 3 H. & C. 639. As regards the question of the allowance to the defendant for his services, the judgment of the learned trial Judge should be affirmed on the principle of the cases cited by him: *Knox v. Gye* (1872), L.R. 5 H.L. 656; *In re Lands Allotment Co.*, [1894] 1 Ch. 616.

I. F. Hellmuth, K.C., and *J. H. Moss*, K.C., for the defendant, argued that as to the oil mill the learned trial Judge was in error in finding that the sale was really to the defendant, as the evidence shewed that the sale to Erbach was *bonâ fide*, as also was the sale by Erbach to the company. The property was fully advertised, and if not bought by Erbach would have been sacrificed. They referred to *In re Postlethwaite* (1888), 37 W.R. 200; *Hickley v. Hickley* (1876), 2 Ch. D. 190. The learned referee erred in holding that the fact that James Livingston financed the undertaking shewed that he was in fact the purchaser. Reference was also made to *Farrar v. Farrars Limited* (1888), 40 Ch. D. 395, *per* Lindley, L.J., at p. 411. As to the branch of the appeal concerning the Yale business, our submission is, that whatever was done by James Livingston was done with John Livingston's knowledge, and that he made no objection. No suspicion of fraud can or should attach to James, and no account can be ordered against him. John by his conduct consented to the carrying on of the Yale business as a separate concern, and the question of the Wuerth, Haist, & Company business rests on the same basis. As regards the question of compensation, no one has suggested that we are not morally entitled to it, but it is urged that we have no legal right to it, as under English law one partner can never be trustee of the estate of another partner. Under our statute we are constructive trustees, and as such are entitled to compensation, as found by the learned referee. They referred to the Trustee Act, R.S.O. 1897,

ch. 129, sec. 40; *Knox v. Gye*, *supra*, where see dissenting judgment of Lord Hatherley, L.C., at p. 678; *Butler Trustees v. Butler* (1896), 29 Nova Scotia 145, and cases there cited; *Gordon v. Holland* (1913), 82 L.J.N.S. (P.C.) 81, 87; *Power v. Power* (1884), L.R. (Ir.) 13 Ch. 281; *Betjemann v. Betjemann*, [1895] 2 Ch. 474; *Friend v. Young*, [1897] 2 Ch. 421; *Taylor v. Taylor* (1873), 28 L.T.R. 189; *In re Tilsonburgh Lake Erie and Pacific R.W. Co.* (1897), 24 A.R. 378. On the question of competition, they cited *Trimble v. Goldberg*, [1906] A.C. 494, *per* Lord Macnaghten at p. 500 *et seq.*, and cases there referred to, also the *Dean* and *Aas* cases, *supra*.

Osler, in reply, on the question of compensation, argued that, as it was admitted that the trust was not express, it would be necessary to give "trustee" the widest meaning. Is a surviving partner a trustee, and if so who are the *cestuis que trust*? He referred on this point to *Taylor v. Taylor*, *supra*, and *In re Aldridge*, [1894] 2 Ch. 97; also Pollock on Partnership, 8th ed., note to para. 43. As to the oil mill transaction, the evidence shewed that the defendant created a corporation to buy the property. He practically bought it himself, and Erbach was a mere cloak for him.

December 7. MEREDITH, C.J.O.:—This is an appeal by the plaintiffs from an order dated the 16th April, 1912, made by Middleton, J., reversing the findings of a special referee with respect to certain items in the plaintiffs' surcharge, and a cross-appeal by the defendant from the same order in so far as it reversed the findings of the referee with respect to certain other matters on the reference before him.

The matters to which the appeal and cross-appeal relate may be referred to as: (1) the Yale business; (2) the Wuerth, Haist, & Company business; (3) the oil mill property; (4) the defendant's claim for commission.

The findings of the referee are embodied in a report dated the 7th December, 1910, and, in so far as they affect the matters in controversy on the appeal, are:—

"That the defendant is chargeable with his one-third interest in the Yale business, and must account therefor and for all

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profits made in respect thereof, provided that, if in accounting it is shewn that the defendant has put into the Yale business any moneys that did not belong to the firm of J. & J. Livingston, then such money shall be excluded from such accounting but not any profit made in respect thereof" (para. 2).

"That the defendant is chargeable with his interest in the firm of Wuerth, Haist, & Company, and must account therefor and for all profits made in respect thereof" (para. 4).

"That the alleged sale of the oil mill and foundry property made on the 22nd July, 1897, to Philip Erbach, must be treated as a purchase by the defendant, and the defendant must account for the property in question and his dealings therewith" (para. 5).

"That the defendant is entitled to remuneration by way of compensation for his care, pains, and trouble and for the time expended in and about the partnership estate as follows: one per cent. on the turn-over of \$1,676.881.08 and two and a half per cent. on the realisation of all the capital of the business; these allowances to be charged in the usual way in the partnership account, so that the defendant and the plaintiffs will each pay one-half thereof" (para. 7).

By the order appealed from, paragraph 2 of the report is set aside, and it is declared that the defendant is not chargeable with his one-third interest in the Yale business and not liable to account therefor; paragraph 4 is also set aside, and a similar declaration is made as to the Wuerth, Haist, & Company business; paragraph 5 is also set aside, and it is declared that the defendant is not liable to further account in respect of the sale of the oil mill and foundry property therein referred to; paragraph 7 is also set aside, and it is declared that the defendant is not entitled to any remuneration by way of compensation for his care, pains, and trouble and for the time expended in and about the winding-up of the partnership estate.

The appeal of the plaintiffs is as to the order in respect of paragraphs 2, 4, and 5; and the defendant appeals from the order in so far as it disallows his claim for compensation.

The reasons of the referee for his findings and the reasons for

judgment of the learned Judge are set out at length in the appeal case, the former at pp. 281 to 303 and the latter at pp. 306 to 311. and the reasons for judgment of the learned Judge are also reported in 26 O.L.R. 246.

The argument of counsel has failed to satisfy me that the conclusion of my brother Middleton as to the Yale business is erroneous.

It is, no doubt, clear law that a partner must account to his firm for the profits made by him in any business of the same nature as and competing with that of his firm if he carries on any such business without the consent of his partners.

I share the doubt of my brother Middleton as to the Yale business being of the same nature as and competing with the partnership business; but, assuming it to have been, the evidence, in my opinion, establishes that it was carried on with the consent of John Livingston.

If the testimony of James McColl is believed, and there is no reason why it should not be, the proper conclusion is, I think, that John Livingston consented to a partnership being formed by his brother James, Peter Livingston, and McColl, for carrying on the Yale business, and to its being carried on by that partnership on its own account and independently of the partnership of J. & J. Livingston. That John Livingston had a fixed determination, owing to his experience in another partnership, not to enter into partnership with any one but his brother James, is proved; and, according to McColl's testimony, when he told John Livingston of the intention of McColl, Peter Livingston, and James Livingston, to embark in the Yale business, and was asked if he would join with them, John Livingston refused to do so, reiterating his determination not to go into partnership with any one but his brother James.

That John Livingston was aware that the Yale business had been established is beyond question; and, from the facts in evidence, and particularly the fact that in nearly every year statements of the assets and liabilities of the partnership of J. & J. Livingston were prepared and submitted to John Livingston, which purported to shew on the assets side all the mills belong-

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ing to the firm, and no reference was made to the Yale business or mills, and that no objection was made to these statements and no question raised as to their correctness, the inference is to my mind irresistible that John Livingston was a consenting party to the Yale business being carried on by his brother James and his two partners in it as an independent business, in which the firm of J. & J. Livingston had no interest, and in the assets and profits of which that firm had no right to share.

The referee, I think, formed too low an opinion of the business ability of John. No doubt he had not the business ability of his brother James, and his education was limited, but I doubt not that he had a great deal of shrewdness and a pretty good idea of how to take care of himself and his interests.

The referee also lays stress on the fact that it was not pointed out to John what the financial statements contained; but why was it necessary to do this? They were simple documents, couched in simple language, and not requiring any skill to understand; and why too would the farce of shewing them to John have been gone through if the referee's estimate of John's capacity were accurate?

The learned referee, in the reasons for his findings, entirely ignores the evidence of McColl. Why he did so I do not understand, and he gives no reason for ignoring it. It cannot be that he discredited McColl's testimony; for, if he had done that, he would have said so; and I am inclined to think that he must have overlooked it.

The referee also, I think, when he says that the defendant "should have taken proper and definite steps to obtain his brother's views and come to a definite and express understanding about it," puts the defendant's duty upon too high a ground. It is sufficient to shew that John consented to his brother becoming a partner in a firm that was to carry on the Yale business independently of J. & J. Livingston; and that, as I have said, has, I think, been shewn.

Stress was laid by the plaintiffs' counsel upon the correspondence appearing in volume 1 of the exhibits as indicating that the Yale business was treated as a business belonging to the

firm of J. & J. Livingston. There are, no doubt, isolated letters and transactions which would appear to point that way, but these are, I think, explainable; for instance, the signing in the name of the firm of a letter relating to the Yale business, which appears to have been done occasionally by the defendant and the employees in the office of Baden, might well occur in the hurry of business and with men not well versed in accurate methods of conducting a business which from small beginnings had grown to be a very large one. These matters, while relevant to and having some importance on the issue as to the Yale business being a business of J. & J. Livingston, have very little, if any, significance as to the question for consideration on the appeal, and are far outweighed, I think, by the fact that in the books of the firm at Baden an account was kept with the Yale firm, treating it as a separate concern, which was not the case with regard to the branch establishments such as Listowel, Blyth, etc.

It was also argued that the Yale business was "financed" on the credit of the partnership, and that was the view taken by the referee. This, if it were proved, though it would have been material upon the issue as to the ownership of the business, is, I think, immaterial as to the question for decision upon the appeal. I say "if proved," because, in my opinion, it is not shewn that the Yale business was financed on the credit of the partnership; although in form the credit was given to the partnership, it was in fact given to James Livingston or to James Livingston & Company, which is the name the partnership which carried on the Yale business bore. There never was, in my opinion, any obligation entered into by the partnership to repay the advances made for the purposes of the Yale business, and the bank which made them could not have succeeded in recovering them from the partnership.

In my opinion, the appeal fails and should be dismissed.

My brother Middleton dealt with the Wuerth, Haist, & Company business in the same way as with the Yale business, under the mistaken belief that it was conceded that the same considerations were applicable to both of them. There was no evidence of any consent by John Livingston to his brother engaging in the

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Wuerth, Haist, & Company business on his own account, and it was not even shewn that John knew or had any reason to think that James was interested in it.

I would, therefore, reverse the order of my brother Middleton as to that business, and leave the referee's report as to it to stand.

I agree with the conclusion of my brother Middleton as to the liability of the defendant with respect to the oil mill property, but I am not able to agree with his reasons for that conclusion. The view of my learned brother is that the purchase of that property, though in form by Erbach, was in fact a purchase by the defendant, but that the property having been afterwards and before the transaction was attacked transferred by Erbach to an incorporated company called the "James Livingston Linseed Oil Company," at the same price as that for which it was sold to Erbach, there was no profit on the resale to be accounted for; that, nevertheless, the defendant would have been liable to account for the real value of the property, but that there was no liability on that basis, because the referee has found that it was sold for its full value, and that finding has not been appealed from.

My learned brother appears to have thought that the referee found that the defendant was in truth himself the purchaser, and that Erbach was a mere trustee for him. I do not so understand the referee's finding; his conclusion is thus stated on p. 300 of the appeal case: "It seems to me that the whole legal effect of what was done must hinge upon the fact that he had financed the whole scheme, and that, excepting for his arrangement with the bank, the scheme could not have been carried out. In this view of the evidence, I must find that the defendant was in fact the purchaser at the sale in question, and that he must account to the estate for what he received for the property when it was sold by the James Livingston Linseed Oil Company, which he controlled and practically owned."

As I understand this finding, it is not that the defendant was in fact the purchaser, but that, by the application of some supposed legal principle, the fact that "the defendant financed the whole scheme, and that, excepting for his arrangement with the

bank, the scheme could not have been carried out," made it necessary for the referee to find that the defendant was in fact the purchaser.

I know of no such legal principle, and am quite unable to understand why it was not quite open to the defendant, both as a matter of morals and as a matter of law, to provide the money which the purchaser required to enable him to acquire the property and carry on the business. The defendant had as large an interest in the property as the representatives of his deceased brother, and surely there was nothing wrong in his providing the money to enable the purchaser to buy, and by so doing prevent the property being sacrificed. No case was cited in support of the referee's view of the law, and I should be surprised to find any case which gives countenance to the view that a surviving partner, who lends his credit to a *bonâ fide* purchaser of partnership property, is to be held to be for that reason the real purchaser, even though the purchase would not and could not have been made but for the lending of his credit. In saying this I am not dealing with a case in which the partner is to share in the profits but only with that of a *bonâ fide* lending of his credit by the partner to a real purchaser.

I am unable, in view of the facts to which I shall now refer, to agree with the view of my learned brother that the conclusion is "irresistible that Livingston was in truth the purchaser."

The defendant's brother had died; and the defendant, as surviving partner, was left to wind up the affairs of a very large business, the operations and assets of which extended over a wide expanse of territory, and no proper records of which were kept in the books of the partnership. The success of the business had resulted largely from the capable management of it by the defendant; it was a business of a somewhat precarious and uncertain nature, and it was important that, if the best price was to be obtained for the assets, there should be as little delay as possible in disposing of them. The defendant's adviser was the late Chief Justice Moss, and the adviser of those interested in the estate of the deceased partner was the late B. B. Osler, who was not only a distinguished lawyer but an able business man. It is doing no injustice to the beneficiaries under the will of the

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deceased partner to say that they do not appear to have been disposed to render much assistance to the defendant in discharging the arduous task which had devolved upon him of realising the assets of the partnership and winding it up, though they may have had reasons which they may have thought justified the attitude which they took. I do not doubt that the defendant was desirous of acquiring the oil mill property for himself. He knew, however, that he could not become the purchaser of it without the consent of the beneficiaries under his brother's will. It was not unreasonable for him to believe that there would be no difficulty in his obtaining that consent if he were willing to pay a fair price for the property, and it is more than probable that, under this belief, and being willing to pay a fair price for the property, he made the purchase of the large quantity of flax which he bought.

Negotiations for the purchase of the property were entered into, and proceeded so far that an offer was made for it by the defendant of a price which Mr. Osler thought to be fair and reasonable, and which the defendant had every reason to believe would be accepted, but which the beneficiaries, against the advice of Mr. Osler, declined to accept. What, then, was the position of the defendant? His offer to buy had been refused; he had on his hands the large quantity of flax which he had purchased; and, if the value of the property was not to be depreciated, it was important that a sale should be effected as speedily as possible. He knew that he could not buy without the consent of the beneficiaries, and that had been refused. It was not likely that as shrewd a business man as he, and a man who had occupied a seat in the Legislative Assembly of the Province and in the House of Commons, would not know that the prohibition against his becoming the purchaser applied as well to a purchase in the name of another as to one directly by himself, and it is not too much to assume that he had been so advised by so careful a lawyer as the late Chief Justice Moss was. In the circumstances, what more natural than that he should look about to find a means of disposing of the property, and that it should have occurred to him that he would give to those who had been his faithful employees, and were with one exception his relatives,

the opportunity of becoming the purchasers, and in that way of enabling them to reap any advantage that might accrue from the carrying on of the business, instead of running the risk of not being able to find another purchaser, and the loss to himself, as well as to the beneficiaries, consequent upon the property being left idle and its depreciation in value from that cause; and what was strange, in the circumstances, in his being willing to sell to these men the flax that he had bought and to become their "financial backer?" He had confidence in the men, whom he knew, and the risk he ran was not great.

It was strenuously argued that everything that occurred in connection with the purchase, the formation and financing of the company, and the subsequent acquisition by the defendant of most of the shares of the company's capital stock, all pointed to the conclusion that the defendant was the real purchaser; that the purchase by Erbach, the transfer by Erbach to his associates, the formation of the company, and the allotment of the shares to Erbach and his associates, were all shams designed to conceal the fact that the defendant was himself the purchaser. I am unable to agree with that contention. All that was done was under the eye of the late Mr. Barwick, who had become the legal adviser of the defendant after Mr. Moss went upon the Bench, and I do not believe that it would have been possible for the defendant, if he had been minded to do it, to have carried out such a scheme under Mr. Barwick's eye. It is a significant fact that, when Liersch withdrew from the company, he was paid \$8,000 for his interest in it. This is quite inconsistent with the theory of the plaintiffs, unless upon the hypothesis, for which there is no foundation, that there was some reason, apart from Liersch having a substantial interest in the property, which made it worth that sum to the defendant to get rid of him.

The strongest point made by the plaintiffs was the way in which the defendant afterwards became possessed of the majority of the shares of the other purchasers of the property. Under ordinary circumstances, and if they had been strangers to the defendant, it would give rise to grave suspicion as to their having any real interest in the property or in the shares; but the circumstances were not ordinary, and these purchasers were

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relatives of the defendant. They evidently had great confidence in him, and it was by his generous assistance that they had acquired the property; and it is certainly not improbable that, when he requested them to transfer their shares to him, they were willing to do so, trusting to his dealing fairly with them when the property was disposed of; though in the case of strangers and under different circumstances the absence of any stipulation as to the consideration to be paid for the shares or arrangement as to payment for them would justify at least grave suspicion as to Erbach and his associates being anything but trustees for the defendant.

A statement of the relations which existed between the defendant and his brother, and the manner in which their partnership affairs were conducted, would seem incredible to most persons, but there is no question about it upon the evidence, and it is accounted for by the character of the partners and the absolute confidence they had in one another; and why may it not be that the unbusinesslike nature of the transactions between the defendant and his relatives was due to the implicit confidence which his relatives reposed in him? If in the transactions of the two brothers, extending over several decades and involving transactions of such magnitude, no writing nor even any explicit bargain was deemed necessary, but each relied on the good faith of the other, why may not the same have been the case with regard to the transactions between the defendant and his relatives?

Some significance was attached by counsel for the plaintiffs to the withdrawal by the defendant of the guarantee he had given to the bank; but I am unable to see what bearing that has on the question for decision, unless indeed it makes against the contention of the plaintiffs. If the defendant was the real owner of the property and business, what object would be served by withdrawing the credit? I could understand that his action might have been designed to force the company and its shareholders to hand over the property and business to him; and it may be that, seeing that the business had been a profitable one and that there was a prospect of being able to turn it over to a "combination" at an inflated price, the defendant regretted the generosity he had shewn, and hoped by withdrawing his guarantee to force the shareholders to hand over their property and business

to him, leaving him to give them what he pleased as compensation when the property and business were sold.

This disposes of all the grounds of the appeal of the plaintiffs, and there remains to be considered the cross-appeal of the defendant.

That, unless entitled to it under the provisions of the Trustee Act, the defendant is clearly not entitled to compensation for his services as surviving partner in winding up the affairs of the partnership, was not disputed by his counsel; but it was argued that the defendant was, in respect of these duties, a trustee, and therefore entitled to compensation under the provisions of the Trustee Act. I am unable to agree with that argument, and am of opinion that the defendant was not a trustee, not even an implied or constructive trustee.

In *Knox v. Gye*, L.R. 5 H.L. 656, 675, 676, it was said by Lord Westbury: "Another source of error in this matter is the looseness with which the word 'trustee' is frequently used. The surviving partner is often called a 'trustee,' but the term is used inaccurately. He is not a trustee, either expressly or by implication. . . . It is most necessary to mark this again and again, for there is not a more fruitful source of error in law than the inaccurate use of language. The application to a man who is improperly, and by metaphor only, called a trustee, of all the consequences which would follow if he were a trustee by express declaration—in other words a complete trustee—holding the property exclusively for the benefit of the *cestui que trust*, well illustrates the remark made by Lord Mansfield, that nothing in law is so apt to mislead as a metaphor." Lord Westbury goes on to say (p. 676): "There is nothing fiduciary between the surviving partner and the dead partner's representative, except that they may respectively sue each other in Equity. There are certain legal rights and duties which attach to them; but it is a mistake to apply the word 'trust' to the legal relation which is thereby created."

Although the Lord Chancellor (Lord Hatherley) dissented very strongly from the statement of Lord Westbury that there was no fiduciary relation between the survivor of two partners and the executors of the deceased partner (p. 679), I find that the earlier part of the speech of Lord Westbury which I have

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quoted is referred to with evident approval by Lord Kinnear in the recent case of *Bank of Scotland v. Macleod*, [1914] A.C. 311, 324.

The position of a surviving partner with respect to the realisation of the partnership is not, I think, different from that of a mortgagee selling under a power of sale in his mortgage, and it was said by Lindley, L.J., in *Farrar v. Farrars Limited*, 40 Ch. D. 395, 410, 411: "A mortgagee with a power of sale, though often called a trustee, is in a very different position from a trustee for sale. A mortgagee is under obligations to the mortgagor, but he has rights of his own which he is entitled to exercise adversely to the mortgagor." It is, I think, only by metaphor that the surviving partner is called a trustee, and what I gather from the observation of the Lord Justice is that, in his opinion, it is only by metaphor that a mortgagee selling under a power of sale in his mortgage is called a trustee.

That the duties of a surviving partner with regard to the realisation of the partnership assets are of a fiduciary character is undoubted, but he is not a trustee, and his position is analogous, I think, to that of the promoters in *Omnium Electric Palaces Limited v. Baines*, [1914] 1 Ch. 332, 347.

If I had come to the conclusion that the defendant was an implied or constructive trustee, it would have been necessary to consider whether, as respects his services before the Trustee Act (1 Geo. V. ch. 26) came into force (the 1st June, 1911), he was entitled to the benefit of the provisions of sec. 66 of that Act; for, before that Act came into force, the right of a trustee to a fair and reasonable allowance for his care, pains, and trouble and his time expended about the estate was confined to trustees "under a deed, settlement or will:" R.S.O. 1897, ch. 129, sec. 40.

For these reasons, I am of opinion that the defendant's cross-appeal fails and should be dismissed.

The result is, that the appeal of the plaintiffs as to the Yale business and the oil mill property is dismissed with costs here and below, and that their appeal as to the Wuerth, Haist, & Company business is allowed with costs here and below, and that the defendant's cross-appeal is dismissed with costs here and below.

MACLAREN and MAGEE, JJ.A., concurred.

HODGINS, J.A.:—The estate of John Livingston (hereinafter called the appellants) appeal as to (1) the Yale business, (2) the Wuerth, Haist, & Company business, (3) the remuneration allowed to James Livingston (hereinafter called the respondent); and the latter appeals as to the sale of the Baden oil wells. As to the last the respondent disputes the finding that he was in fact the purchaser, while the appellants contend that the judgment is wrong in allowing nothing in respect of profit made on the sale to the Dominion Linseed Oil Company. The opinion of the learned referee and the judgment of Mr. Justice Middleton are both founded upon a survey of the facts and circumstances proved, and both think that these point to a purchase by the respondent in the name of Erbach. Mr. Justice Middleton, however, treats the subsequent transfer to the James Livingston Linseed Oil Company as a valid sale, and as absolving the respondent from liability, as the price was the same as that paid by Erbach for the respondent. Upon the appeal to this Court the view just indicated was attacked as unsound, and the transaction itself and the subsequent actions of the respondent and the members of the company were urged as being the natural outcome of a scheme originated by the respondent to purchase in such a way as to mislead the appellants. It may be necessary to consider the exact position of the respondent as surviving partner in discussing the question of remuneration, i.e., whether he became and was a trustee. But, upon this branch of the case, I think it sufficient for the purposes of the appellants if the respondent occupied, in relation to the sale and purchase, a fiduciary position, whether he can be properly described as a trustee in the full sense of the term or not.

To quote the words of Knight Bruce, L.J., in *Bowes v. City of Toronto*, 11 Moo. P.C. 463, 518, “he may not have been an agent or trustee within the common or popular acceptance of either term, but he was so substantially.”

The situation of a surviving partner is often a difficult one, and in some cases an unfair one, while, on the other hand, he is in possession and may, if he chooses, make it hard for the deceased partner's estate to secure a speedy and profitable realisation of the assets. The surviving partner has his own interest

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in the assets to look after, and, if he possesses the knowledge, ability, and money which would enable him to continue the profitable business carried on during his partner's lifetime, he finds himself debarred, except by leave of the Court in an action, from acquiring, even upon the fairest terms, the business as a going concern. He is bound to use his best endeavours to secure a price which is only likely to be paid by some one who contemplates carrying on the business established by the partnership, and who will, if the surviving partner himself intends resuming his old occupation, prove at least a rival to be contended with. But if, to deal with the other aspect, he refuses to manage the business, so that it may be sold as a going concern, he may at once embark in the same line and may establish himself to such an extent as to make it practically impossible for the estate to realise the best result from a sale of the assets. While, therefore, there is undoubted necessity for holding him strictly to his duty, there is no urgency to do more than insist that, while acting fairly and reasonably, he shall not buy from himself nor sacrifice the interest of the estate of his deceased partner.

The disability which is attached to the surviving partner by the rule that he shall not himself become the purchaser of the firm assets, may, of course, be relaxed upon a proper case being made out in an action to wind up the partnership affairs. But its foundation is the well-understood rule that no one in a fiduciary position is permitted to place himself in a situation where his interest and duty conflict. Hence it is no answer that he may have paid the full price obtainable or even a larger price than any one else would give. The vice exists if there is a clear conflict, and to reduce it merely to a question of price is to refine the principle away. If the circumstances shew that the respondent in fact occupied such a questionable position, then it is not hard to apply the rule. This must arise in his dealings with the partnership assets; and, if these assets have passed into the hands of third parties, it is obvious that, unless the transfer has been a sham, his after-dealings with them are not sufficient to raise the question at issue: *In re Postlethwaite*, 37 W.R. 200. In other words, they are important only in their bearing upon the original scheme to mislead, which is the essential fact.

Among the many cases cited, I have not found any which better illustrate the position which, while effecting the sale, I think the surviving partner occupied, than the case of *Nugent v. Nugent*, [1908] 1 Ch. 546, although in that case the receiver did not conduct the sale. The defendant in a partition action and a part owner was appointed receiver of the rents and profits of a house at Hove. He bought the house at a mortgage sale. Cozens-Hardy, M.R., at p. 548, says: "Now, what is the position of the receiver towards the beneficiaries in this case? Plainly a fiduciary one. That cannot be disputed. It makes no difference whatever that the receiver here was one of the tenants in common. In that character alone she would not have filled a fiduciary position, but a receiver must be in a fiduciary position to all the tenants in common, and it makes not a farthing difference whether the receiver was herself one of the owners. On what ground, then, can this case be taken out of the usual rule? I fail to see any. The receiver, being in this fiduciary position, having full knowledge and special opportunities of knowing the rentals of the property and the other circumstances, was just in that position which brings the case, and brings it very plainly and strongly, within the rule of the Court that a person in a fiduciary position, having special means of knowledge, ought not to be allowed to buy or to bid for the property without the leave of the Court. It is said, and there is a great deal of plausibility in the argument, that this, after all, was merely a house in Hove about which there would be no special knowledge. I think we ought to decline to go into that, because when once we arrive at this point, that the doctrine of the Court does not depend on the fact of undue knowledge, but merely on the probability of it, and that the man is in a position where his duty and interest are in conflict, we ought not to consider whether, under the special circumstances of the particular property, there is any great probability of fraud."

The desire of the respondent to buy these oil wells was fully disclosed, and his purchase of 176,578 bushels of flax seed indicates that he must have believed he would be able to do so. When his offer was refused, his solicitors notified the appellants that the syndicate which afterwards purchased in the name of Erbach

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would be prepared to buy. It was quite natural that, if he could not buy himself, he would prefer that the purchasers would be friendly, and he may have been quite willing to assist them and put them under an obligation, as indeed he did. Not only had he a half interest in the price, but he could not expect to realise upon his seed without loss unless he secured a purchaser for the mill who would be willing to repay him. Assume his good faith, and the impelling reasons for getting up and assisting the syndicate are obvious. It is not suggested or argued that the price was under the value of the mill, although it was less than he had offered. The case is, therefore, free from the suspicion which would arise if a less price had been obtained. It is asserted that a surviving partner may lend the money to a *bonâ fide* purchaser to enable him to buy or may assist him otherwise, provided always that no arrangement, understanding, or scheme exists, whereby the transaction becomes a sham sale: *In re Postlethwaite*, 37 W.R. 200 (*ante*); and this is, I think, the critical point in the case.

The referee did not see all the witnesses, and Mr. Justice Middleton saw none, so that this Court is at liberty to do as they did, i.e., examine the circumstances to see whether they are or are not consistent with the evidence given by the parties that the sale was a *bonâ fide* one.

I have gone over the evidence with care and with a full appreciation of the difficult position in which the respondent was placed. I find his purchase of the seed was begun in the October previous to the sale, which was five months after his brother's death, on the 25th May, 1896. It is not stated when it arrived, but it was brought from Manitoba, and by water, as the autumn was the best time to buy, and, as this seed was in Baden before the sale was advertised in June, it must have come to Baden in the autumn of 1896. His solicitors did not include the oil mill in the original poster for the sale of the flax mill, the contents of which were discussed in February, 1897. The writ in this action was issued in April, 1897. In May he offered \$45,000 for the oil mill and foundry and stated that on the acceptance of the offer he would organise a company to operate the property, and his solicitors stated that the purchase would be completed imme-

diately upon its confirmation by the Court. The appellants having declined to agree, the respondent at first intimated that he would rely upon the arrangement agreed to between the solicitors; but, as this was apparently only tentative, he abandoned that position almost immediately in favour of a sale by auction.

The correspondence at this time shews that the parties were completely at arm's length. Read in the light of the refusal to allow the respondent to buy, it seems to me that the proceedings thereafter lead rather to the conclusion that the respondent made up his mind to take whatever steps were open to ensure the sale of the mill in such a way as that he would control it, and that he did so. It cannot be said that he was quite candid about the supply of flax seed then on the premises. His solicitors intimate (18th June, 1897) that the sale must be had on the 22nd July, as a "purchaser must have possession immediately after this date, so that he may be in a position to purchase this season's flax seed, which will soon afterwards be coming on the market." He also says that the property will not bring at auction more than \$20,000 to \$25,000. On the 19th July, 1897, three days before the sale, his solicitors write: "We have had no inquiries whatever, although the property has been widely advertised, but Mr. Philip Erbach, who is manager of the mills, has been engaged for some days in getting up a syndicate to purchase. He has been joined, he tells us, by Mr. Peter Livingston, brother of the late Mr. John Livingston, by Mr. John Livingston, Mr. Peter Livingston's son, by Mr. W. H. Erbach, and by Mr. E. Liersch. They fully intend, we understand, to bid for the property, and it is possible they may be the only bidders. We intend to reserve the right to make one bid so as to prevent the property being sacrificed. We enclose herewith a copy of the proposed conditions of sale, and will be glad to know whether you have any suggestions to make with regard to them. It is the intention of the gentlemen mentioned above to form a company in the event of their becoming purchasers and to transfer the property to this company." The events mapped out in the letter were exactly followed. If the definite statements contained in it, and the form of the document which they signed in contemplation of the

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sale, are compared with the evidence of Liersch, John R. Livingston, and particularly Philip Erbach, it is well nigh impossible to avoid the conclusion that the respondent knew more about the affair than did the three gentlemen examined. The respondent, strange to say, states quite positively twice that he did not know that these parties were going to bid (pp. 115, 180).

The sale took place on the 23rd July, 1897, and on the 24th July, 1897, a copy of the agreement was sent to the appellants. This was evidently the agreement shewn on pp. 13, 14, and 15 of vol. II. of the exhibits, the formal contract for sale not having been completed till the 26th August, 1897.

The agreement containing the important clause, dealing with the possible inability of the respondent to complete the sale by a conveyance from the executors, was not sent to them until the 31st May, 1898. Its significance is pointed out in the evidence of the respondent, who had inserted it to enable him to cancel the bargain if he could not get a conveyance from the executors within the year. The letter of the 2nd September, 1897, from the respondent's solicitors, purporting to give the whole position of the matter, contains, this statement: "This company can do nothing in the way of obtaining credit until the property is conveyed to it." Yet credit had been got on the guarantee of the respondent, and, only nine days after, the company had agreed to pay \$158,921.07 for the respondent's flax seed, although Erbach swears they could have done with only \$10,000 or \$25,000 worth of seed. The statements in the letters of the 31st May, 1898, and 13th October, 1898, are not in accord with the actual state of affairs then existing. In the former the respondent is represented as fearing that unless a conveyance is made before the expiration of the year the purchasers may want to back out of the bargain, and as stating that the oil market is not an improving market. There is no evidence at all that the purchasers wanted to back out. They had conveyed the property to the company which had been formed, and they were having an excellent year, which in August shewed a profit of \$61,240. Besides this, the minutes of the company disclose on the 24th June, 1898, a confirmation of the agreement substituting the company as purchasers, which would hardly have been done if they were desirous

of backing out at the end of the year, then only one month distant. In the latter, where mention of the respondent's guarantee is first disclosed, an internal difficulty in the company is reported, "resulting in Mr. Liersch being bought out by the other shareholders." The only trace of a difficulty is with the respondent, and the purchase of his stock appears to have disposed of this gentleman, who had gone to another bank to see if the company could get credit there when the respondent withdrew his support. It is also stated that the respondent had not been satisfied with the position of affairs and had lately withdrawn his guarantee. The respondent himself rather indicates a doubt as to whether the obvious inference from the way in which it is put was intended by him (p. 124), and states that his reasons for dissatisfaction were private, and declines to disclose them. He admits that he had not examined the books and did not know about the company's profits, and does not "believe he knew" about the audit at the date of the letter. Further it is there said that the shareholders are unable to pay up sufficient to provide working capital, "and they have appealed to Mr. James Livingston for assistance," also that "the present shareholders have appealed to Mr. James Livingston to relieve them by taking some of the stock off their hands, and paying it up. This appears to be the only course open." If, as P. Erbach stated, there were some of the parties concerned who could pay the purchase-money (\$38,500) three times over, there is a difference at once between that fact and the statement in the letter regarding the financial ability of the shareholders.

And, if P. Erbach's evidence as to his willingness to go into the venture originally, because he knew the business and could run it without help from the respondent, is to be believed, it is hard to understand his application to the respondent in the nature of an appeal for relief after one prosperous year, and during another which, in August, shewed profits of \$46,988.

I have only referred to a few of the facts which strike me, in addition to those referred to in the report of the learned referee. When to their effect is added the circumstances that P. Erbach was next in command to the respondent at the Baden establishment of J. & J. Livingston, and that the other four

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associates were employees in that concern, it is hard to accept the result of their testimony or to believe that this purchase by them was not made at the suggestion, or certainly with the approval, of the respondent, and that for some reason or another the underlying facts were not communicated to the appellants.

The subsequent transactions are not, to my mind, any more satisfactorily explained, and certainly are such as would not be expected if the facts and figures surrounding the purchase of the mill, the formation of the company and its prosperous career, are taken to be real transactions. I do not detail them because they are carefully collected by the learned referee. On the whole, there is an air of unreality over the scene, which is not removed by either the evidence of the participants, the events which transpired, or the written documents. It is, however, urged that, granting the suspicious nature of each event, yet viewed in the light of the situation created by the refusal of the appellants to agree to a purchase by the respondent and of his natural desire to prevent his own interest being wrecked by what he considered the unreasonable course of the appellants, the true explanation of them all is, that, while the respondent did not buy and the syndicate did not buy for him, yet he exercised his right in assisting the purchaser to buy. It is argued that, even if he "financed the whole thing," to use the expression of the learned referee, he did not offend against the rule which has been invoked. In other words, by so doing, he did not buy from himself, nor did he make a profit of his office. This contention is opposed to the rule as expressed by Chief Judge Bacon in *Ex p. Moore* (1881), 45 L.T.R. 558, "a trustee may not sell to any one so that he may himself obtain a profit," which, however, is wider in its terms than other cases seem to warrant. But it is in many respects similar to that which prevailed in *Hickley v. Hickley*, 2 Ch. D. 190, and in *Farrar v. Farrars Limited*, 40 Ch. D. 395, and which secured the adherence of two very eminent Judges of this Court in *Segsworth v. Anderson* (1894), 21 A.R. 242. Mr. Justice Maclellan, with whom Mr. Justice Burton agreed to the fullest extent, in dealing with the guarantee of the purchase-money by an inspector of the estate of an insolvent, in consideration of a mortgage from the purchaser securing pay-

ment of his individual debt, thus argues the question (p. 253): "As inspector of the estate he was in effect in the same position as the assignee; he was a trustee vendor. If under these circumstances he had secretly become the purchaser, the assignee or the creditors on finding it out could either set the sale aside, or could affirm it, and require him to account for the profit made on a resale, as being clearly a profit made out of his trust; and if he could not himself become the purchaser without accounting for profit, can he bargain with a stranger who has purchased from him, to assist the latter in his financial arrangements for carrying out the sale, and to receive compensation for so doing for his own benefit? To take a simple case: a trustee sells property for its full value, and the money is to be paid on a certain day; when the day arrives the purchaser has not the money, and he asks the trustee vendor to advance it to him by way of a loan at interest and for a commission, which he does, must he account to the trust for the interest and the commission? Or suppose the purchaser asks the trustee to endorse his note at the bank for a commission to enable him to procure the money, is the commission profit made out of his trust? The profit is closely connected with the trust in both cases, but yet I know of no case which goes so far as to hold that in either case it would be a profit made out of his trust for which the trustee would be accountable. Unquestionably in such cases the risk is the personal and private risk of the trustee. He gives value for the commission received. No part of the value is given by or derived from the trust; and it seems to me that the profit cannot be said to arise or to be derived from the trustee's office within the meaning of the rule in equity or the decisions thereon. The trust does not give rise to the profit, but merely to the transaction or occasion out of which it arises. I admit the cases supposed are near the line, but I think they are outside of it."

While this statement is not adopted by the Supreme Court of Canada, yet their judgment (1895), 24 S.C.R. 699, restoring that of the trial Judge, indicates that their view was that what the inspector was to account for was the benefit he obtained over others in respect to the old debts, a profit to which the estate was entitled to lay claim.

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I was at first inclined to the opinion that the proper conclusion to be drawn from the facts, and especially the subsequent transactions, was that adopted by my brother Middleton. But, on reflection, I think that Mr. Justice Burton, in the case referred to, has expressed the true rule when he says (p. 246): "A pretty long experience has satisfied me that a mere case of suspicion ought not to lead us to ascribe anything wrong to the parties whose conduct is impugned. Fraud, or anything which would in law be regarded as fraud, ought to be proved, not surmised."

The facts in this case are consistent with the view that the respondent assisted the purchasers by his guarantee with the idea that he would be able to control their dealings for his own advantage. I think the proper deduction from what appears is that the respondent was advised that he could not purchase directly or indirectly, and that the formation of a company, to be assisted and afterwards controlled by him, through a purchase or transfer of shares, was the plan really adopted by him and in fact carried out.

The price obtained for the property is not asserted to have been below its value. It was open to the appellants to bid and to buy, and it may be that the assistance, either promised or expected, enabled a better price to be got than might otherwise have been obtained. But I cannot find anything upon which I can confidently rest my opinion that the design I have mentioned was communicated to the purchasers or formed part of the original arrangement with them. They were probably used for the purpose, but, as they were put into a prosperous business, it is reasonable to suppose that the respondent did not intend that they should lose. They may even have believed that, if they went into the venture and became responsible for the purchase-money of the respondent's seed, \$158,000, they could count on the respondent being too much interested to let the business fail.

I understand the law to be, that if in the arrangement for sale by a trustee-vendor he stipulates for or receives a benefit he must account for it, if the sale is adopted by the *cestuis que trust*. But, if the sale is *bonâ fide* and for a fair price, and to an individual whose personality and will may defeat or thwart a design harboured by the trustee to benefit himself in regard to the sub-

ject of sale—to one who is in fact independent of the trustee—then I think the latter is not within the rule invoked. An understanding that the trustee would relieve the purchaser, if dissatisfied, was not enough to render the trustee liable: *In re Postlethwaite (ante)*; for, as expressed by Lewin, there was no contract or understanding amounting to more than mere expectation (12th ed., p. 569). The sale here was completed before the acquisition of the shares by the respondent (see minutes of company, 27th September, 1898, and 9th January, 1899).

The unusual and extraordinary dealings with the stock in the company afterwards may be explained by the peculiar relationship and intimacy between the purchasers and the respondent, as indicated in the judgment of my Lord the Chief Justice, and by the view that they may have been willing to trust the respondent, as their negotiator in the proposed merger, with their stock, expecting that he would be able to do better for them than they could do themselves, and that he could be trusted to divide the spoils generously.

I, therefore, with some doubt and hesitation, think that the judgment of my brother Middleton on this point should be affirmed, though upon different grounds.

With regard to the Yale business, the circumstances are detailed in the report of the learned referee, and in a less degree in the judgment appealed from.

Knowledge of the establishment of the Yale concern is traced to John Livingston, through the evidence of McColl. While there is no direct corroboration of the latter's statement that John knew that the respondent, McColl, and P. Livingston, were going into business in Michigan and declined to join it, there are many matters relied on as affording what is required to enable the Court to accept McColl's account as establishing against the deceased's estate the fact of knowledge and the extent of it.

I am impressed, after reading the evidence and going through the details, financial and otherwise, regarding the many transactions which took place from 1887 to John's death, with the view that very many, if not all, of them might be regarded by John without any suspicion that the respondent did not represent in them the interests of the partnership instead of merely

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himself. So far as the partnership books are concerned, they are not inconsistent with the position that the interest of the respondent covered that of the partnership. In fact the entries and the whole course of business tend to produce the impression that the Yale business was part and parcel of the partnership concern or was in some way connected with it in intimate business relations (pp. 21, 22, 23, 24, 33, 36, 37, 138, 144, 146, 147, 153, 229, 230). There was, according to Spence (pp. 144, 167), no profit to Baden shewn by the transactions entered in the books, a fact quite natural if it was merely a record of that part of the business, but unusual if it were a venture entirely outside it. Even the special account of John and James Livingston which was used in connection with the Yale business did not appear in the firm books (p. 40), and all the money that was got from time to time from the bank was procured on the credit of John and James Livingston (p. 228). The fact that the bank statements contained no reference to Yale is proven, but that these statements were gone over with John rests on the uncorroborated testimony of the respondent, and at one place (p. 217) he says that sometimes he and John talked over the statements in preparing them, and sometimes not, and his reference to the way in which the statements for the bank were made out indicates that they were not intended to be full and complete. The respondent further admits that he never told John about taking in partners in the Yale business (p. 223), and hence the statement that John would never go into partnership with anybody outside himself, loses much of its weight. It might seem fair that the brother who was so completely trusted should at all events have given John a chance to express his mind upon the point when it actually arose, if he desires now to say that he acquiesced. In connection, too, with the Wuerth, Haist, & Company business, the respondent admits that he does not know whether or not John knew that he was interested in the business, and his name never appeared in it.

McColl's statement that John wanted nothing to do with the Yale business (p. 259) might only indicate a personal repugnance to go in, but not a declining to allow the respondent to do so for the firm's benefit. Why should John have spoken to his

wife frequently about the Michigan business if he was not in any way concerned in it? In his earliest examination, and in speaking of John's knowledge of the starting of the Yale business, the respondent argues when he says (p. 214): "Of my own knowledge I don't know whether he knew or not; only I reckon he must have known, because he couldn't help but know." And he adds, later on, that he never had any conversation with him about it (p. 216).

But, if John's knowledge is conceded, I think that not merely knowledge but acquiescence or assent to its being carried on for the benefit of others should be shewn, and that the principle which underlies such cases as *Somerville v. Mackay*, 16 Ves. 382 (a question of pleading), *Clegg v. Edmondson* (1857), 8 DeG. M. & G. 786, 807, *Parker v. McKenna* (1874), L.R. 10 Ch. 96, 124, *Dunne v. English* (1874), L.R. 18 Eq. 524, requires this. I am unable from anything proved by the evidence to assent to the conclusion that John consciously agreed to what it is now said was being done.

It was argued that this was not a competing business, and the judgment in appeal agrees with that view.

As I understand the cases, competition in fact is not the final test, but rather the sameness of the business as transacted with that being carried on by the main concern. It is thus within the scope of the partnership business, and this fact is the foundation for holding that engaging in it is a fraud on the partnership relationship, and a breach of the duty owed by the delinquent partner. I do not think that he is enabled to engage in ventures within the actual and daily scope of the partnership, because they may not deal with the same customers. The essence of the offence is engaging in a business as a sole venture where that business is one properly within the scope of the partnership as carried on. It is thus competing, though not so as to exhaust the full meaning of that word, if the sphere properly covered by the business to be done as a partnership is invaded by the individual partners.

In *Dean v. MacDowell*, 8 Ch. D. 345, James, L.J., in discussing the rule of good faith between partners, says (p. 351): "Nor must he carry on the business of the partnership or any

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business similar to the business of the partnership in his own or another name separate from it, otherwise than for the benefit of the partnership. As Mr. Justice Lindley has put it in his book, he must not carry on any other business in rivalry with the business of the partnership, because in truth, if he does carry on the very same business in rivalry with the partnership, the option of the other partners seems to be to say,—That was a business within the scope of the partnership, and although you did it secretly or in connection with some other person, I elect to take the profits of it, because it was part of the business for which the partnership was established, and I elect to say that what you have been doing nominally for yourself, but really for the partnership, was for the benefit of that partnership.” Lord Justice Cotton puts it thus (p. 354): “If profit is made by business within the scope of the partnership business, then the partner who is engaging in that secretly cannot say that it is not partnership business. It is that which he ought to have engaged in only for the purposes of the partnership.”

The case of *Aas v. Benham*, [1891] 2 Ch. 244, when carefully examined, shews that the Lords Justices regarded the business carried on by one partner as outside the scope of the partnership business, and although Lindley, L.J., in one place (p. 255) uses the expression, “of the same nature as and competing with that of the firm,” in another (pp. 255, 256) he speaks of the principle as being, “if he avails himself of information for any purpose which is within the scope of the partnership business, or of any competing business . . . he must account for the profits.”

The fair result of the evidence is, that the business carried on at Yale was within the scope of the partnership business, and that it dealt with the same customers in the same commodities, and competed with the firm in sales.

I agree with the judgment in appeal upon the question of remuneration. The original relationship did not constitute the respondent a trustee, nor did the death of his brother. In carrying out his legal obligation to realise the estate and pay the debts, circumstances occurred which gave rise to a fiduciary relationship and duty, and the sale of the partnership assets is one

of these occasions. The case of a mortgagee is similar in principle. He is not a trustee for sale in the ordinary sense. He has rights of his own, but he is under certain obligations to the mortgagor.

But I think the case of *Knox v. Gye*, L.R. 5 H.L. 656, has not been definitely overruled as to the actual status of a surviving partner, although in the case of *Gordon v. Holland* (1913), 108 L.T.R. 385, 389, it is pointed out that the question was not necessary for the decision of the case. Unless the respondent can be regarded as an express trustee, I do not think our statute applies. The statement of the result of *Knox v. Gye* by Lord Justice James in *Taylor v. Taylor*, 28 L.T.R. 189, is too broad, if it means that there never can be any fiduciary relationship between the surviving partner and the representative of the deceased partner occasioned by the process of winding up. And in a late case, *Bank of Scotland v. Macleod*, [1914] A.C. 311, the case of *Knox v. Gye* is referred to by one of the Lords with approval.

The result is, that the appeal of the executors of John Livingston should be allowed with costs as to the Yale and Wuerth, Haist, & Company businesses, and the judgment of Mr. Justice Middleton should be affirmed as to the Baden Oil Mill, as indicated, with costs, and that the cross-appeal of the defendant should be dismissed with costs as to the question of remuneration. There should be a declaration that the interest of James Livingston in the Yale business and in the Wuerth, Haist, & Company business belonged to the partnership, and that he is bound to bring them into the account and pay over the profits attributable to those interests. There should be a reference back to the referee to ascertain the amount of those interests and profits.

James Livingston should be allowed remuneration as manager, to be fixed by the referee, and deducted from the profits.

*Order below varied; HODGINS, J.A.,
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Master and Servant—Injury to Servant—Miner Working in Shaft Struck by Bucket and Cross-head—Breaking of Cable—Evidence—Res Ipsa Loquitur—Negligence—Defects—Want of Inspection—Damages.

The statement in Beven on Negligence, 3rd ed., p. 130, that the rule of evidence *res ipsa loquitur* does not apply to a case between master and servant, is too broad.

Examination of the cases cited by Beven.

The principle enunciated in *Scott v. London and St. Katherine Docks Co.* (1865), 3 H. & C. 596, 601, 140 R.R. 627, 631, viz., that the inference may be drawn from the happening of an accident, in the absence of explanation by the defendant, that it arose from want of care upon the part of the defendant or his servants, but not necessarily want of care for which the master is responsible to his workman—the master's duty being to take reasonable care and to make reasonable effort to provide a safe place and safe machinery in which and with which the servant is to work, but not to guarantee that place and machinery shall be absolutely safe—is the true one.

In this case—one of personal injury to the plaintiff, working in the defendant company's mine, by a bucket and cross-head falling upon him, because of the breaking of the cable by which the bucket was lifted—it was held, upon the evidence, that the falling of the bucket and cross-head was not due to any negligence on the part of the plaintiff or any of his fellow-servants, but was due to three causes: (1) a defect in the cable; (2) the insufficiency of the clip; and (3) the insufficiency of the stop-blocks; that the defect in the cable might and ought to have been discovered if the cable had been properly inspected; that either there was no inspection provided for or the person charged with the duty of inspecting was negligent in the performance of it; that the insufficiency of the clip and the stop-blocks was due to the negligence of the defendant company or of the person who was entrusted by it with the duty of seeing that these safeguards were properly provided. And, the accident having happened from one or more of the three causes named or from the combined effect of all three of them, the plaintiff made a case enabling him to recover damages for his injury.

Hayward v. Hamilton Bridge Works Co. Limited (1914), 7 O.W.N. 231, and *Hanson v. Lancashire and Yorkshire R.W. Co.* (1870), 20 W.R. 297, distinguished.

APPEAL by the plaintiff from the judgment of the Judge of the District Court of the District of Sudbury, after trial without a jury, dismissing the action, which was brought to recover damages for personal injuries sustained by the plaintiff, while working for the defendant company in one of its mines, by being struck by a bucket and cross-head, which fell by reason of the breaking of a cable.

November 24. The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A.

J. S. McKessock, for the appellant, referred to the Mining Act, R.S.O. 1914, ch. 32, sec. 164, rule 98, and argued that the respondents were liable by reason of the defective cable, the breaking of which caused the accident, and of which no proper inspection had been made. He referred to *Gaiser v. Niagara St. Catharines and Toronto R.W. Co.* (1909), 19 O.L.R. 31, 33; *Murphy v. Phillips* (1876), 35 L.T.R. 477; *Christie v. Griggs* (1809), 2 Camp. 79; *Ainslie Mining and R.W. Co. v. McDougall* (1909), 42 S.C.R. 420; *Canada Woollen Mills Limited v. Traplin* (1904), 35 S.C.R. 424.

J. M. Clark, K.C., for the defendant company, respondent, referred to Halsbury's Laws of England, vol. 21, p. 434; *Black v. Ontario Wheel Co.* (1890), 19 O.R. 578; *Rickards v. Lothian*, [1913] A.C. 263; *The Virgo* (1876), 35 L.T.R. 519; *Wakelin v. London and South Western R.W. Co.* (1886), 12 App. Cas. 41; *Village of Granby v. Ménard* (1900), 31 S.C.R. 14; *Stokes v. Eastern Counties R.W. Co.* (1860), 2 F. & F. 691; Beven on Negligence, 3rd ed., p. 130, where it is laid down that *res ipsa loquitur* does not apply in master and servant cases.

McKessock, in reply.

December 7. The judgment of the Court was delivered by MEREDITH, C.J.O.:—This is an appeal by the plaintiff from the judgment of the District Court of the District of Sudbury, dated the 10th October, 1914, which was directed to be entered by the Judge of that Court, after the trial before him, sitting without a jury, on the 25th April, 1914.

The action is brought to recover damages for personal injuries sustained by the appellant while employed by the respondent as a labourer in one of its mines.

The appellant, when he met with his injuries, was working as a "mucker" at the bottom of a shaft several hundred feet deep, in a mine of the respondent, and his duties were to "muck" and to give the signal for raising the laden buckets, which were moved by electrical power operated upon the surface. The shaft was divided into four compartments, two for the buckets, one for a cage, and the fourth for a ladderway. The compartment in which the appellant was working was not timbered to the bottom

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of the shaft. The bucket was lifted by means of a steel cable, and there was a cross-head weighing, according to the testimony of the appellant, about a ton, but, according to the testimony of the witness Stovel, about 400 pounds; and there was a clip attached to the cable, the purpose of which was to keep the cross-head, as was stated on the argument, 10 feet away from the bucket; and there were, at the distance of 100 feet from the bottom of the shaft, stop-blocks intended to prevent the cross-head from descending below that point. While the bucket, which had been filled, was being raised to the surface, the cable broke "right at the bucket," and the bucket and the cross-head fell to the bottom of the shaft, striking the appellant, who had "got out of the way in a corner;" and it is in respect of the injuries thus sustained that the action is brought.

Thomas Kopra, who was working with the appellant and was an eye-witness of the accident, testified that the cross-head was not broken; that the cable was "middling old," and he had been "afraid of it for some time;" that there was no device to prevent the bucket from falling if the cable broke; and that he "could not say what caused the cross-piece to fall unless the clamp," i.e., the clip, "got out."

Joseph A. Stovel, the superintendent in charge on the day of the accident, was called as a witness for the defence, and he testified that "the weight of the bucket loaded would not exceed 3,000 pounds;" that the manufacturer from whom the cable was purchased represented to the respondent that it would stand a strain of 30 tons; that from his experience the cable was sufficient for many times the possible strain that would be put on where it was then being used; that there was a safety spool or clip under the cross-head which was fastened to the cable; that there were stop-blocks at the bottom of the timbering for preventing the cross-head from leaving the timbering, and so arranged as to allow the bucket to continue to the bottom of the shaft; that he could not say what was the cause of the accident; that the cable had been in use since April, 1912; that he thought it was broken in two places; that he found the clip above the timber of the cross-head (*sic*) after the accident, and that, if the clip comes off, it allows the cross-head to drop to the bucket; that

since the accident the cable had been replaced with a one-inch cable, "as the men were apprehensive;" and that, judging from the position in which he found it, the clip would not have come off while the bucket was ascending.

Stovel was not asked and he did not say anything as to the cable or any part of the hoisting apparatus having been inspected after the cable was put in, in April, 1912, and there was no evidence that any of them had ever been inspected, although the respondent's general superintendent gave evidence.

The learned Judge determined the case on the application of the principle that "where the thing is shewn to be under the management of the defendant or his servant, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of proper care," and his conclusion upon the evidence was, that the respondent had met this onus, and had shewn that it had exercised proper care; and he, therefore, gave judgment dismissing the action.

I am, with respect, of the opinion that this conclusion was not well-founded. The evidence of Stovel was most unsatisfactory. Although the accident had resulted in the death of one workman, as well as in causing the appellant's injuries, Stovel, though he was the superintendent in charge, appears not to have taken the trouble to ascertain definitely whether there was more than one break in the cable; all that he was able to say was, "I think the cable was broken in two places;" and it is somewhat significant that although, according to the evidence adduced by the appellant, the break in the cable occurred at the point of its junction with the bucket, so far as Stovel was concerned it did not appear that any examination had been made of that part of the cable—an examination which would, I have no doubt, have shewn whether there was a defect in the cable at that point, and, if there was, the nature of it. It is to be observed, also, that, even if the cause of the break in the cable had been ascertained, and it had appeared that the defect was a latent one, there still remained the falling of the cross-head to be accounted for. That, according to the testimony of the appellant

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and the witness Kopra, was due, in their opinion, to the clamp getting out or not being on the cable, and it is clear that the cross-head would not have fallen to the bottom of the shaft if the stop-blocks had been sufficient to arrest its progress. It is true that Stovel testified that he found the clip above the timber of the cross-head (*sic*) after the accident, but he did not state when that was, and he was unable to give any opinion as to the cause of the fall of the cross-head. The evidence on this point of the appellant and Kopra is, I think, to be preferred to that of Stovel. There was, besides, no explanation offered as to the cause of the cross-head falling to the bottom of the shaft. According to Stovel's testimony, the means adopted to prevent it from descending below the timbering was the placing of stop-blocks at the point where the timbering ended. He did not explain why the stop-blocks had not arrested the fall of the cross-head nor did he say that the stop-blocks had broken away, and it is a proper conclusion from what happened that, if the stop-blocks were there, as probably they were, they were insufficient, and that the respondent was negligent in not having stop-blocks of sufficient strength to withstand the impact of the falling cross-head.

These considerations and the fact that no attempt was made to shew that the cable or the safety devices were ever inspected after April, 1912, lead me to the conclusion that the respondent failed to displace the inference which, if the principle that the learned Judge held to be applicable were applicable, was to be drawn from the happening of the accident.

Counsel for the respondent contended that the fact that, as Stovel testified, the cable was used the day before the trial, with two horses, lifting 15 tons, was conclusive evidence that it was sufficient for the purpose for which it was being used at the time of the accident. I do not think that this contention is well-founded. If, as I think is established, there was but one break, and that at the point of junction of the cable with the bucket, the inference would be that the defect was at that point, and the fact that the rest of the cable was not defective proves nothing as to its condition where the break occurred. It is difficult, too, if, as Stovel said he thought, there were two breaks, to see how the

cable could have been used, as he says it was, on the day before the trial, unless the two breaks were near to one another, and what was used was what remained of it beyond the breaks.

It was, however, argued by counsel for the respondent that the principle which the learned Judge applied was not applicable; that the maxim, or, as I prefer to call it, the rule of evidence, *res ipsa loquitur*, does not apply to a case between master and servant, and he cited in support of his contention Beven on Negligence, 3rd ed., p. 130.

The cases referred to by Mr. Beven in support of this statement do not, in my opinion, justify as broad a statement as he makes.

If all that is meant be that in cases between master and servant the application of the principle enunciated by the Exchequer Chamber in *Scott v. London and St. Katherine Docks Co.* (1865), 3 H. & C. 596, 601, 140 R.R. 627, 631, that "there must be reasonable evidence of negligence, but where the thing is shewn to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care," will not, without more, make a case to go to the jury, I agree with his statement of the law.

All that the application of this principle does is to afford *primâ facie* evidence of negligence on the part of the defendant or his servants; and, inasmuch as the master is not answerable for the negligence of the fellow-servants of the injured workman, and is answerable only for defects in his plant, machinery, or appliances which arose or were not discovered or remedied owing to his negligence, or that of some person entrusted by him with the duty of seeing that their condition and arrangement were proper, it is necessary for the workman to adduce reasonable evidence of this last-mentioned negligence.

In support of his statement of the law, Mr. Beven quotes the following passage from the judgment of Willes, J., in *Lovegrove v. London Brighton and South Coast R.W. Co.* (1864), 16 C.B. N.S. 669, 692: "It is not enough for the plaintiff to shew that

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he has sustained an injury under circumstances which may lead to a suspicion, or even a fair inference, that there may have been negligence on the part of the defendant; but he must go on and give evidence of some specific act of negligence on the part of the person against whom he seeks compensation."

This is but a statement of the well-established rule that "where the evidence given is equally consistent with the existence or non-existence of negligence, it is not competent for the Judge to leave the matter to the jury:" *per* Williams, J., in *Hammack v. White* (1862), 11 C.B.N.S. 588, 596.

This is not a rule applicable only to cases between master and servant, but is a rule applicable to all actions founded on negligence.

Willes, J., cannot have meant that, where the evidence warrants the inference of the negligence charged, the plaintiff "must go on and give evidence. . . ." What is meant is, I think, that, although it may be a fair inference, it is not the only one that may be drawn from the evidence; just as, in such a case as this, while it might be a fair inference that the falling of the bucket and cross-head was due to negligence for which the defendant was answerable, it would be an equally fair inference that it was due to causes for which he was not answerable.

After making the statement quoted from the judgment of Willes, J., the learned Judge went on to say that "that is well explained by Erle, C.J., in *Cotton v. Wood* (1860), 8 C.B.N.S. 568, 571-2."

In that case Erle, C.J., quoted the following passage from the judgment of Williams, J., in *Toomey v. London Brighton and South Coast R.W. Co.* (1857), 3 C.B.N.S. 146, 150: "It is not enough to say that there was *some* evidence; for every person who has had any experience in courts of justice knows very well that a case of this sort against a railway company could only be submitted to a jury with one result. A scintilla of evidence, or a mere surmise that there may have been negligence on the part of the defendant, clearly would not justify the Judge in leaving the case to the jury. There must be evidence upon which they might reasonably and properly conclude that there was negligence." And the Chief Justice expressed his own views in these

words: "Where it is a perfectly even balance upon the evidence whether the injury complained of has resulted from the want of proper care on the one side or the other, the party who founds his claim upon the imputation of negligence fails to establish his case" (p. 571). Williams, J., agreed with the Chief Justice, and said that "there is another rule of the law of evidence, which is of the first importance, and is fully established in all the Courts, viz., that, where the evidence is equally consistent with either view,—with the existence or non-existence of negligence,—it is not competent to the Judge to leave the case to the jury. The party who affirms negligence has altogether failed to establish it" (p. 573).

In the *Toomey* case Willes, J., said: "In order to establish a case of negligence against the defendant, it was incumbent on the plaintiff to prove some fact which was more consistent with negligence than with the absence of it."

The only other case referred to by Mr. Beven in support of his statement is *Patton v. Texas and Pacific R.W. Co.* (1901), 179 U.S. 658. In that case, in delivering the judgment of the Court, Brewer, J., said (p. 663): "That while in the case of a passenger the fact of an accident carries with it a presumption of negligence on the part of the carrier, a presumption which in the absence of some explanation or proof to the contrary is sufficient to sustain a verdict against him, for there is *primâ facie* a breach of his contract to carry safely . . . a different rule obtains as to an employé. The fact of accident carries with it no presumption of negligence on the part of the employer, and it is an affirmative fact for the injured employé to establish that the employer has been guilty of negligence. . . . In the latter case it is not sufficient for the employé to shew that the employer may have been guilty of negligence—the evidence must point to the fact that he was. And where the testimony leaves the matter uncertain and shews that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible and for some of which he is not, it is not for the jury to guess between these half a dozen causes and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion."

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I venture to think that in substance this statement of the law does not differ from the view I have expressed as to the application, in a case between master and servant, of the principle enunciated in *Scott v. London and St. Katherine Docks Co.*, which is, shortly stated, that the inference may be drawn from the happening of the accident, in the absence of explanation by the defendant, that it arose from want of care upon the part of the defendant or his servants, but not necessarily want of care for which the master is responsible to his workman; the master's duty being to take reasonable care and to make reasonable effort to provide a safe place and safe machinery in which and with which the servant is to work, but not to guarantee that place and machinery shall be absolutely safe.

It may be pointed out, also, that of the cases to which I have referred the only one between master and servant is *Patton v. Texas and Pacific R.W. Co.*

In the recent case of *Haywood v. Hamilton Bridge Works Co. Limited* (1914), 7 O.W.N. 231, Kelly, J., seems to have been of opinion that the fact that a chain which was being used in the work of moving a heavy steel plate, in which the plaintiff was engaged when he met with the injury of which he complained, broke and allowed the plate to fall, was not in itself sufficient *primâ facie* evidence of negligence to call upon the defendant for an explanation. In his statement of the evidence my learned brother said: "There is no evidence of defect or weakness in the chain, or to shew what caused it to break, nor is there anything to indicate that the defendants had been negligent in not providing a better or different chain, or that they had any knowledge of any condition from which they could have known that it was otherwise than safe and fit for the purposes for which it was used. The furthest that the plaintiff or any of his witnesses would go was to say that they had not seen any inspection of the chain." The learned Judge cited in support of his conclusion *Hanson v. Lancashire and Yorkshire R.W. Co.* (1870), 20 W.R. 297. In that case the defect which caused the chain to break was a latent one, and the only evidence adduced by the plaintiff was that the accident happened and that the chain broke owing to a latent defect in it. My brother Kelly also

cited in support of his conclusion Ruegg's Employers' Liability Act, 8th ed., p. 223; and, no doubt, Mr. Ruegg there expresses the opinion that the mere breaking of chains, etc., is not *primâ facie* evidence of negligence. Upon the following page he says: "Nevertheless, very slight evidence is needed, in addition to the breaking or giving way of any of the articles we have mentioned, to raise a *primâ facie* case. Proof that the chain was somewhat worn . . . is the sort of evidence given in employers' liability actions, which, added to the proof of the occurrence, is relied on to avoid a nonsuit and shew a *primâ facie* case of negligence."

The case at bar is, I think, distinguishable from these two cases. Here the defect in the cable, if it was defective, was not a latent one; and, although the general superintendent and the superintendent in charge of the work upon which the appellant was engaged were called as witnesses for the defence, it was not pretended by either of them that there had been any inspection of the hoisting apparatus or its appurtenances. The evidence of Kopra was, that the chain was "middling old," and that he had "been afraid of it for some time." If the clip or the stop-blocks were insufficient, and their condition caused or contributed to the happening of the accident, the defect arose from the negligence of the respondent in not providing a sufficient clip and sufficient stop-blocks; and there was, I think, the additional evidence, beyond the mere proof of the breaking of the cable, which Mr. Ruegg mentions as sufficient to entitle a plaintiff to have his case submitted to the jury, and which warrants the conclusion that the defect in the cable arose from or was not discovered or remedied owing to the negligence of the respondent or of some one entrusted by it with the duty of seeing that its condition was proper for the use to which it was being put.

The proper conclusion, in my opinion, upon the evidence, is, that the falling of the bucket and cross-head was not due to any negligence on the part of the appellant or any of his fellow-servants, but was due to three causes: (1) a defect in the cable; (2) the insufficiency of the clip; and (3) the insufficiency of the

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stop-blocks; that the defect in the cable might and ought to have been discovered if the cable had been properly inspected; that either there was no inspection provided for or the person charged with the duty of inspecting was negligent in the performance of it; that the insufficiency of the clip and the stop-blocks was due to the negligence of the respondent or of the person who was entrusted by it with the duty of seeing that these safeguards were properly provided.

I am not of opinion that, if it did not appear from which of the three causes I have mentioned the accident happened, but it did appear that it must have happened from one or more of them, even assuming the law to be as stated by Mr. Beven, the appellant fails to make out his case. In other words, I am of opinion that, if the conclusion is warranted that the accident happened from one or more of these three causes or from the combined effect of all three of them, the appellant made a case enabling him to recover.

Upon the whole, I am of opinion that the appeal should be allowed with costs, and that there should be substituted for the judgment which has been directed to be entered, judgment for the appellant for \$450 with costs.

The damages were not assessed by the learned Judge, but the evidence amply warrants their being assessed at at least the sum I have named.

Appeal allowed.

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Trusts and Trustees—Shares in Limited Commercial Company Held by Trustee for Estate—Issue of New Shares—Purchase by Trustee for himself—Loss of Control of Company—Depreciation in Value of Shares—Conflict between Interest and Duty—Removal of Trustee—Action Previously Brought to Determine Duty of Trustee Pending and Undisposed of—Declaration of Trust in Respect of New Shares—Evidence.

A testator dying in 1898 appointed a trust company his executors, and devised and bequeathed to them his estate upon trust to sell and convert into money, and out of the proceeds to pay debts and legacies, to set apart sufficient to produce an annual sum which they were to pay to his widow, and ultimately to distribute the estate among his children. The defendant, a son of the testator, in 1907 became trustee in place of the trust company, upon the terms either of the will or of an unsigned declaration of trust then prepared. In May, 1912, an action was begun by two of his brothers against the defendant to prevent the division among the family of 244 shares in a limited commercial company which formed part of the estate, and to compel the sale of the shares *en bloc*. While that action was pending, the defendant acquired in his own right 74 shares from the company, paying for them the par value. Before the issue of these 74 shares, the 244 shares held by the estate were a majority of the shares issued, but, after the 74 were put out, the estate holding was less than 51 per cent. One of the plaintiffs in the first action then brought this action—leaving the other pending and undisposed of—to remove the defendant from his position as trustee and to have it declared that he was a trustee for the beneficiaries under the will of the 74 shares. The issue of the 74 shares at par to the defendant was ratified and approved of by the shareholders of the company at a meeting duly called:—

Held, that, so long as the first action was pending, it would be unjust to remove the defendant from his position as trustee; and, upon the evidence, no case was made for declaring him a trustee for the estate of the 74 shares.

The judgment of BOYD, C., dismissing the action, was affirmed, subject to the right of the plaintiff to apply, after the final disposition of the first action, under the Trustee Act, for the removal of the defendant as trustee, if in that action the rights declared should leave it open to him so to do.

Seemle, that control of a limited company vested in an estate or in an individual is of importance apart from the intrinsic value of the holding. Review of the authorities in regard to conflict between the interest and duty of a trustee.

Seemle, that the principle of the decisions extends to any act where it is established that there is a direct conflict, and to cases where it may be reasonably said that such a conflict may arise.

And *seemle*, having in view the possibility that the voting power on the 74 shares might in some event be used against that of the estate so as to depreciate their value, if it became a question of control, the defendant should relinquish the trust or be removed from it.

Moore v. McGlynn, [1894] 1 I.R. 74, applied.

AN appeal by the plaintiff from the judgment of BOYD, C., at the trial, sitting without a jury, dismissing the action, which was brought to remove the defendant from his position of trustee of

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certain shares of the capital stock of the Hunter Rose Company Limited, a commercial company, and to declare the defendant a trustee for the beneficiaries under the will of George Maclean Rose of 115 shares of the capital stock of the company which were allotted to the defendant by the directors of the company, subject to a lien on those shares for the amount paid by him to the company for them. Of the shares allotted to the defendant only 74 were in question, that number having been bought by the defendant in July, 1912, at par, from the company.

April 24. The appeal was heard by MEREDITH, C.J.O., MAGEE and HODGINS, JJ.A., and RIDDELL, J.

L. F. Heyd, K.C., for the appellant, argued that the defendant had committed a breach of trust in purchasing the 74 shares, as the estate thereby lost the controlling interest, and the value of its holdings became depreciated in consequence. In any case, the defendant should be removed from his position as trustee, as it involves a conflict between his duty and his interest. He referred to *In re Sinclair* (1901), 2 O.L.R. 349.

W. N. Tilley and *J. J. Maclellan*, for the defendant, argued that there was no power in the trustee to buy for the estate, and that the action which he took had no injurious tendency so far as the estate was concerned.

Heyd, in reply.

December 7. The judgment of the Court was delivered by HODGINS, J.A.:—This is an appeal by the plaintiff from the judgment dated the 23rd March, 1914, which was pronounced by the Chancellor after the trial of the action before him, sitting without a jury at Toronto, on the 20th day of that month.

The action is brought to remove the respondent from his position as trustee of certain shares of the capital stock of the Hunter Rose Company Limited, and to declare the respondent a trustee for the beneficiaries under the will of George Maclean Rose of 115 shares of the capital stock of the company, which were allotted to him by the directors of the company, subject to a lien on these shares for the amount paid by him to the company

for them. The shares now in question are, however, only 74 in number, bought by the respondent in July, 1912, at par, from the company.

George Maclean Rose died on the 10th February, 1898, having made his will, dated the 3rd December, 1891, by which he appointed the Toronto General Trusts Company executors and trustees of his will, and devised and bequeathed his estate real and personal to the company upon trust to sell and convert into money such part of his estate as did not consist of ready money, as soon after his decease as his executors and trustees might deem advisable, and out of the proceeds to pay debts, funeral and testamentary expenses, and certain pecuniary legacies, and to invest and keep invested during the lifetime of his wife, in securities in which his trustees were by law authorised to invest trust moneys, such sum or sums as should be necessary to produce an annual income of \$1,200, and to pay that income to his wife during her lifetime, and he directed that after the death of his wife the sum so set apart should form part of his residuary estate. This residuary estate he directed his trustees to divide equally between his nine children, the shares of the sons to be paid to them as they respectively attained the age of 25 years, and the shares of the daughters to be paid to them as they respectively attained the same age, or married, whichever event should first happen, and he provided that, as some of his children had already attained the age of 25 years, those who had reached that age should be paid their shares as soon after his decease as might be convenient.

The will also contains provisions as to the disposition of the shares of any of his children who should predecease him. The only other provision to which reference may be made is the following: "I do not wish to interfere with the discretion of my trustees in the manner in which they shall convert my estate into ready money after my decease, but for the purpose of letting my wishes be known to them with regard to my business as printer and publisher which is at present carried on by me, but which desire or wish my trustees are not to consider as binding on them, I declare that in the selling of my business my trustees shall give my three sons, Daniel A. Rose, William W. Rose, and

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Frederick W. Rose, who are now engaged with me in my said business, the first opportunity to purchase same if all necessary and suitable arrangements can be made between them and my said trustees.”

The respondent became trustee in place of the Toronto General Trusts Corporation on the 8th September, 1907, upon the terms either of the will or on those of an unsigned declaration of trust prepared contemporaneously with his accession to the trust.

On the 14th May, 1912, an action was begun by the present appellant and Malcolm C. Rose, a brother, to prevent the division among the family of the shares owned by the estate, 244 in number, and to compel the sale of the shares *en bloc*. A motion was made for an injunction, and on the return thereof it was arranged that it should be turned into a motion for judgment upon facts to be agreed upon. Pending this, and before any statement of facts was settled, the 74 shares in question were bought by the respondent from the company at par. The estate, owning 244 shares, had a majority of those issued, but, after the 74 were put out, the total amount of stock became 500 shares, thus leaving the estate with less than 51 per cent.

The present action was then brought, leaving the other suit pending and undisposed of. The Chancellor gave judgment dismissing this action, and the present appeal is brought from that decision. No reasons were given for the dismissal.

Counsel for the appellant argued that the action of the respondent in buying the 74 shares, depreciated the value of the holdings of the estate in so far as the estate thereby lost the controlling interest, and that the respondent had committed a breach of trust and should be removed.

It may be added that, at a meeting of shareholders duly called, the issue of the 74 shares at par to the respondent has been ratified and approved of. The time originally fixed as the limit for the issue of the then remaining shares in the company to the shareholders of the company *pro ratâ* at par had expired, and the resolution of the directors on the 28th August, 1907, provided that thereafter the shares might be subscribed for by any other shareholder, and failing this might be sold to others.

The value of the shares, if the balance-sheet of 1912 is taken as a basis, would be \$218 apiece, but that is obviously no test of their real, nor of course of their selling, value.

The point for decision is, whether a breach of trust has taken place on the part of the trustee in so purchasing the remaining shares, if that depreciated or might depreciate the value of those held by him for the benefit of the estate, or, if not a breach of trust, whether the respondent should be removed from his office on the ground that his interest and his duty conflict.

No doubt, control of a limited company vested in an estate or in an individual is of importance apart from the intrinsic value of the holding.

The respondent here has not dealt with any trust property nor has he made any profit out of it. The sole ground put forward is that his personal action in acquiring other shares, validly issued, confirmed as it was by the shareholders of the company, will result in a possible depreciation of the selling value of the shares held by him as trustee, if they are to be sold *en bloc*. I am far from thinking that this is proved to be certain or even probable. The sale of shares in a commercial company to an outsider is always a difficult matter, the purchaser being usually guided by considerations other than their intrinsic value. That value depends so much upon the conduct of the business and the commercial outlook that, upon the evidence given in this case, it would be impossible to say that depreciation in fact has taken or will take place. The company had the right to issue the shares, and the shares might have been purchased by an outsider, in which case the result asserted would equally have happened.

The rule as to conflict between interest and duty is laid down in *Hamilton v. Wright* (1842), 9 Cl. & F. 111, by Lord Brougham, thus (p. 123): "There cannot be a greater mistake than to suppose . . . that a trustee is only prevented from doing things which bring an actual loss upon the estate under his administration. It is quite enough that the thing which he does has a tendency to injure the trust; a tendency to interfere with his duty." He then cites instances such as the purchase of the trust estate, and proceeds: "Then if it be said that the

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creditors are not actually injured, or that the fund either to pay them, or to hand over by way of reversion to the creator of the trust deed, cannot be lessened by such purchases, inasmuch as the debts must be satisfied whether payment is made to the original creditor or to the trustee who takes an assignment,—the answer is, that he shall not avail himself of rights so purchased by him, although those rights might not have come in competition with the trust had he not purchased; and so it has been decided in *Wright v. Wright*, Morr. 16193, and in *Anderson's Case*, 21st November, 1740. Nor is it only on account of the conflict between his interest and his duty to the trust that such transactions are forbidden. The knowledge which he acquired as trustee is of itself sufficient ground of disqualification, and of requiring that such knowledge shall not be capable of being used for his own benefit to injure the trust; the ground of disqualification is not merely because such knowledge may enable him actually to obtain an undue advantage over others. In *Ex p. Lacey* (1802), 6 Ves. 626, Lord Eldon denied the doctrine supposed to have been delivered by Lord Loughborough in *Whichcote v. Lawrence* (1798), 3 Ves. 740, that a trustee must make some advantage of his purchase before it can be set aside; because in 99 cases out of every 100, he held that it might be impossible for the Court to examine into this matter. So the conduct of the trustee not being blameable in the purchase, is nothing to the purpose; for the Court must act, his Lordship said, upon the general principle; and unless the policy of the law makes it impossible for the trustees to do anything for their own benefit, it will be impossible for the Court to see in what cases the transaction is morally right, and in what cases it is not."

The first part of this quotation is cited with approval by Mr. Justice Pearson in *Bennett v. Gaslight and Coke Co. of London* (1882), 48 L.T.R. 156.

In *Broughton v. Broughton* (1855), 5 DeG. M. & G. 160, Lord Cranworth lays down the rule in much the same language. He says (p. 164): "The rule . . . has been treated at the bar as if it were sufficiently enunciated by saying that a trustee shall not be able to make a profit of his trust, but that is not stating it so widely as it ought to be stated. The rule really is, that no

one who has a duty to perform shall place himself in a situation to have his interests conflicting with that duty.”

In *Moore v. McGlynn*, [1894] 1 I.R. 74, the Vice-Chancellor, in discussing the position of a trustee who set up a business of his own in the same town, which was of the same nature as that carried on by his testator's house of business, expressed himself as unable to hold that in so doing the trustee was guilty of a breach of trust, but that he had thereby disqualified himself from remaining any longer a trustee, and he removed him as trustee and manager.

In *Hamilton v. Wright*, the trustee had bought a debt, subsequent to and not covered by the trust for payment of debts in a trust deed, and his personal interest was said to be in the cutting down the residue of the debtor by the amount of the debt assigned, and the keeping of as large a fund as possible free from the operation of the earlier debts, so as to satisfy the subsequent one more surely and speedily.

In *Bennett v. Gaslight and Coke Co. of London*, one of the trustees, while acting as trustee for the benefit of Wallace's creditors under a contract of agency for the gaslight company, secretly negotiated for and effected an agreement in his own interest, to become effective when the agency contract terminated. The interest which he had in defeating any extension of the contract for the benefit of Wallace's creditors is obvious.

In *Moore v. McGlynn* it was said that his duties and his self-interest might conflict.

The principle laid down by Lord Brougham is adopted in such cases as *Thompson v. Havelock* (1808), 1 Camp. 527, at p. 528; *Shipway v. Broadwood*, [1899] 1 Q.B. 369, at p. 373; *Benson v. Heathorn* (1842), 1 Y. & C. Ch. 326, at p. 341; and *Tennant v. Trenchard* (1869), L.R. 4 Ch. 537.

In *Re Iron Clay Brick Manufacturing Co., Turner's Case* (1889), 19 O.R. 113, 123, Mr. Justice Robertson expresses himself in this way: “No one standing in or occupying a fiduciary relationship can be permitted to do an act on his own personal behalf, which might or could be construed to be inconsistent with the fiduciary character which he had at the time.”

The principle of these decisions extends, it seems to me, to

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any act where it is established that there is a direct conflict, and to cases where it may be reasonably said that such a conflict may arise. I can conceive of a position arising by the acquisition of shares by a trustee to which this rule may be applicable. But this is not at present one of these cases to which the rule, if extended to cases of possible conflict, can be applied. This respondent was not appointed by the testator, but by the beneficiaries, and if he holds the estate shares as trustee for them, their rights must be determined by the terms of the trust they created. It is doubtful whether the respondent holds the shares under the terms of the will, or whether the act of the beneficiaries created an entirely new status and responsibility, evidenced by the unsigned memorandum to which reference has been made. Under either, it would be competent for the *cestuis que trust* to put an end to the trust, or for the trustee, if the time has come for winding it up, to do so. From his evidence it appears that he is anxious to do this, and that before the writ in the first action was issued he so declared himself. His intention in acquiring shares beyond what he then held may be, in one view, as much in the interest of his *cestuis que trust* as against it, for his idea seems to have been to prevent the sale to an outsider and to preserve for the estate a control through him of the situation and of the business. It would at this juncture be unjust to assume that his interest and his duty do or may conflict; a decision as to which cannot be made until the terms of his duty are ascertained and defined. If it turns out to have been his duty to divide the estate shares among the beneficiaries, it is plain that his purchase of the 74 shares could by no possibility have injured the estate. It is a strange position for the appellant to occupy, namely, that, while the respondent as trustee is anxious to put an end to the trust by distributing the shares among those entitled to them, the appellant should have pending an action to prevent him from doing this, and at the same time be endeavouring to remove him from the trust because he will not sell to an outsider, the result of which would be to give away the control of the business, against the wishes of the majority.

The relief sought, namely, to remove the respondent as

trustee is just what the respondent himself is anxious to accomplish in another way. While the first action is pending, to determine whether the respondent should be compelled to sell the estate shares in a block, or whether he is not entitled to rid himself of the trust by dividing them among those entitled—in short, the very point at issue between the parties—it would be manifestly unjust to remove him.

It may be that, applying the case of *Moore v. McGlynn*, and having in view the possibility that the voting power on the shares of the respondent might in some event be used against that of the estate so as to depreciate their value, if it became a question of control, the respondent should relinquish the trust or be removed from it. But it must be first determined what his duty is. When that point falls to be settled, reference may usefully be made to the case of *In re Marshall*, [1914] 1 Ch. 192.

I think that the rights, if any, of the appellant, would be fully provided for by postponing decision as to any action such as that until the determination of the first pending action. It will be there adjudged whether the respondent is bound to sell *en bloc*, and in that case he may desire to have leave to bid, and that leave, if granted, would end his fiduciary position: *Coaks v. Boswell* (1886), 11 App. Cas. 232. The other relief sought, namely, to declare him a trustee for the estate of the 74 shares, is of course impossible upon the evidence. He became possessed of these shares, paying for them with his own money; the estate has and can have no claim upon them, unless they were in some way acquired as a gift or addition to the estate which he was disabled from acquiring in his own behalf. No such suggestion is put forward.

The appeal should be dismissed with costs, and the appellant should have the right, notwithstanding this dismissal, to apply after the final disposition of the first action, under the statute, for the removal of the respondent as trustee, if in that action the rights declared leave it open to him so to do.

Appeal dismissed.

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RE HARPER AND TOWNSHIP OF EAST FLAMBOROUGH.

Dec. 17.

Municipal Corporation—Money By-law—Motion to Quash—Approval of By-law by Railway and Municipal Board—Municipal Act, R.S.O. 1914, ch. 192, sec. 295 (4)—Interpretation of—Approval Certificate Rescinded by Board—By-law Standing Approved when Notice of Motion Served—Right of Court to Entertain Motion when Bar Removed—Illegality of By-law—Issue of Debentures to Raise Money for High School Building.

As the rights of a plaintiff must be determined as of the teste of the writ of summons by which his action is commenced, so, generally speaking, the rights of an applicant for a summary order quashing a by-law must be determined as of the day of the service of the notice of motion.

Section 295 (4) of the Municipal Act, R.S.O. 1914, ch. 192, provides that where a money by-law of a municipality has been approved by the Ontario Railway and Municipal Board, the validity of the by-law "shall not thereafter be open to question in any court."

The money by-law which the applicant sought to have quashed had been approved by the Board before the motion was launched; but the motion was enlarged, and, upon application to it, the Board set aside its approval certificate. It was then objected that the by-law could not be quashed, upon the motion launched at a time when the by-law was not "open to question in any court."—

Held, that sec. 295 (4) should be interpreted as meaning that the Court cannot question the validity of a by-law which has been approved by the Board if the approval is in existence when the Court is called upon to decide.

Seemle, that an action begun which can be met by a plea of estoppel will lie if the estoppel be removed before the matter comes to adjudication: *Goodrich v. Bodurtha* (1856), 72 Mass. (6 Gray) 323; and, although a judgment is not the less an estoppel because it may be reversed on appeal: *Marchioness of Huntly v. Gaskell*, [1905] 2 Ch. 656, 667; the estoppel existing when the proceeding began, but removed before it came up for adjudication, is not to be regarded as a bar.

The objection was overruled; the motion to quash was heard upon the merits; and the by-law in question, which provided for the issue of debentures in order to raise one-half the cost of construction of a new high school building, was quashed, following *Re Fowler and Village of Waterdown* (1914), 7 O.W.N. 309.

MOTION by J. C. Harper, a ratepayer of the township, for an order quashing a by-law passed by the municipal council of the township providing for the issue of debentures in order to raise one-half the cost of construction of a new high school building, in the township, for the Waterdown high school district, made up of the municipalities of Waterdown and East Flamborough. The similar by-law of the village of Waterdown was quashed by LATCHFORD, J., on the 25th November, 1914: *Re Fowler and Village of Waterdown*, 7 O.W.N. 309.

December 16 and 17. The motion was heard by RIDDELL, J., in the Weekly Court at Toronto.

J. G. Farmer, K.C., for the applicant.

W. T. Evans, for the township corporation, objected that the by-law had been approved by the Ontario Railway and Municipal Board, under sec. 295* of the Municipal Act, R.S.O. 1914, ch. 192.

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December 17. RIDDELL, J.:—This is an application to quash a by-law of East Flamborough: the particulars are set out in the judgment of Mr. Justice Latchford in *Re Fowler and Village of Waterdown*, 7 O.W.N. 309.

The notice of motion to quash having been served, it was discovered that the by-law had been approved by the Ontario Railway and Municipal Board: and, when the motion came on before the Chancellor, he enlarged it that the applicant might apply to the Board to have the certificate set aside. He did so with effect, and the certificate was set aside accordingly. The motion came on before me; and, on objection taken that the notice of motion was served when the by-law was inexpugnable by reason of the provisions of the Municipal Act, R.S.O. 1914, ch. 192, sec. 295(4), I enlarged the argument that counsel might consider the point.

Argument was renewed and completed to-day.

The objection is, that, as the rights of a plaintiff must be determined as of the teste of the writ: *Cornish v. Boles* (1914), 31 O.L.R. 505, 521; *Northern Electric and Manufacturing Co. Limited v. Cordova Mines Limited* (1914), 31 O.L.R. 221, 238, 243; so the rights of an applicant on such a motion as the present must be determined as of the day of the service of the notice of motion, the beginning of the proceeding: *Re Shaw and City of St. Thomas* (1899), 18 P.R. 454. No doubt, speaking

295.—(1) The council of a municipality which has heretofore passed or shall hereafter pass a money by-law, or a by-law imposing a special assessment or a special rate under this or any other Act, or the holder of any debenture issued under any such by-law . . . may apply to the Municipal Board for a certificate approving the by-law. . . .

(4) Every by-law approved by the Board and the debentures issued or which may thereafter be issued in substantial conformity with its provisions, shall be valid and binding upon the corporation and upon the property liable for the rate imposed by or under the authority of the by-law, and the validity of the by-law and of every such debenture shall not thereafter be open to question in any court. . . .

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generally, that is so; but I do not think that such a principle is conclusive here. The section cannot be read literally—it cannot be that, after a by-law has been approved by the Board, it is not “open to question in any court:” if the approval is withdrawn and the order of the Board set aside, no one would argue that “thereafter” a motion could not be prosecuted begun by a notice served thereafter.

Full effect can be given to the section by interpreting it as meaning that the Court cannot question the validity of a by-law which has been approved by the Board if such approval is in existence when the Court is called upon to decide. And this works both ways: if the approval of the Board were obtained after notice served and before the return thereof, I have no doubt the Court could not declare the by-law invalid.

No case has been cited in which a plaintiff, having begun an action in ignorance of a bar existing to his obtaining his rights, but on discovery of the bar procuring its removal, is still barred because of that previous obstruction.

Were this a case of estoppel, difficult questions might arise: but, even then, there is respectable authority for the proposition that an action begun which can be met by a plea of estoppel, will lie if the estoppel be removed before the matter comes to adjudication.

In *Goodrich v. Bodurtha* (1856), 72 Mass. (6 Gray) 323, a note had been sued upon and judgment given thereon in the Court of Common Pleas. Action was brought upon this judgment, and, while the action was pending, the former judgment was set aside. The defendant thereupon amended his answer, and the plaintiff obtained leave at the trial to add a claim upon the original note. It was held that this was proper. It may, of course, be said that the setting aside of the judgment upon the note was on the ground of want of jurisdiction, and consequently the judgment never had legal validity and could have no effect. But that is not the ground on which the Court proceeds—what is said is (p. 324): “The defendant answered merger of the note in the judgment. To this the obvious reply was and is, that upon the reversal of the judgment, the merger ceased. It was as if no judgment had been rendered.” Clearly, when the action

was brought, an action upon the note would not lie—but, the obstruction by way of merger being removed, the plaintiff was allowed to set up what he could not have sued upon, and his judgment on this count was sustained.

The difference between merger and estoppel I do not go into. The cases are not few in which, when the matter came on for consideration and determination by the Court, an estoppel by way of judgment existed, the fact that the judgment might be appealed as in *Doe v. Wright* (1839), 10 A. & E. 763, *Overton v. Harvey* (1850), 9 C.B. 324, *Scott v. Pilkington* (1862), 2 B. & S. 11, *Nouvion v. Freeman* (1889), 15 App. Cas. 1, or even had been appealed and the appeal was pending, as in *Harris v. Willis* (1855), 15 C.B. 710, was held to be immaterial. As Cozens-Hardy, L.J., puts it in *Marchioness of Huntly v. Gaskell*, [1905] 2 Ch. 656, at p. 667, “A judgment is . . . not the less an estoppel . . . because it may be reversed on appeal. . . .” But I know of no case in which the estoppel had been removed at the time the matter came up for adjudication, and it was held that the estoppel existing at the beginning of the proceedings still continued as a bar.

I think the motion must be heard on the merits: and on the merits I am bound by the judgment of Mr. Justice Latchford in 7 O.W.N. 309. It is argued that certain parts of the judgment of Mr. Justice Lennox in *Re Dougherty and Township of East Flamborough* (1914), 6 O.W.N. 487, are opposed to my brother Latchford’s view: but these are obiter, and must have been considered in the later case in 7 O.W.N. 309.

I think the motion must be allowed with costs (including costs of the postponements).

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MACMAHON v. TAUGHER.

Aug. 7.

Dec. 21.

Solicitor—Agreement Made with Client in Foreign Country—Contingent Fee—Share of Estate—ChamPERTY—Law of Ontario—Foreign Law—Agreement Made after Relationship of Solicitor and Client Arose—Duty of Solicitor—Action to Set aside Agreement—Evidence—Extortionate and Unconscionable Bargain.

The plaintiff was entitled under the will of her father-in-law to the whole of his estate remaining after the decease of his widow, in the event of her surviving her brother-in-law, who was to have the income for his life. The estate was in Ontario, in the hands of a trustee. After the death of the widow, the brother-in-law being alive, the plaintiff, who was living in the State of California, in needy circumstances, consulted the defendant, an attorney practising in that State, who had formerly been a member of the Ontario Bar, as to whether she could get something presently from the estate; and an agreement was then made between them, in California, whereby he was to endeavour by negotiation to obtain from the brother-in-law some portion of the estate by way of settlement or compromise, and, in the event of his being successful, he was to have for his remuneration one-half of the sum received. In the event of the brother-in-law dying before any settlement should be effected, the defendant was to have one-fourth of what the plaintiff might receive under the will. The plaintiff had no professional advice other than the defendant's, and stated that she relied upon him. No settlement was effected, the brother-in-law died, and the defendant claimed one-fourth of the estate:—

Held, that it was not necessary to decide whether the validity of the agreement and the rights of the parties under it were to be determined by the law of Ontario or by that of California, for in either case the nature and terms of the agreement and the circumstances in which it was entered into were such that it must be considered extortionate and unconscionable so as to be inequitable against the plaintiff and not binding upon her. In bargaining with a woman who was, as the defendant knew, in dire straits for money, out of employment, and dependent on the generosity of a friend for even the means of subsistence, as well as in bad health, and therefore likely to jump at anything which seemed to promise even the chance of getting money, regardless of the price she was to pay for it, every principle of fair dealing demanded that, before exacting such a price for his services as the defendant stipulated, he should have taken care to see that she thoroughly understood not merely the terms but the effect of the agreement she was entering into, and that he did not do; and, even if he had done so, he could not escape from the position of having exacted from her an agreement which required her to pay him for his services a compensation which he must have known was grossly in excess of the value of any services he was likely to be called upon to render.

Per MEREDITH, C.J.O.:—An agreement that the attorney's compensation for services rendered in recovering property for his client shall be a share of the property or a proportion of its value, though not valid and binding upon the client according to the law of Ontario, is not, *per se*—provided that the compensation is not extortionate and unconscionable so as to be inequitable against the client—opposed to public policy: the view expressed in *Ram Coomar Coondce v. Chunder Canto Mookerjee* (1876), 2 App. Cas. 186, 209, is to be preferred to that expressed in *Strange v. Brennan* (1846), 2 Q. B. 1.

Per KELLY, J., at the trial:—When the agreement was made, the relation of solicitor and client existed, and, according to the laws of the State of California, where the agreement was made and the parties then resided, the agreement could not be upheld.

Per GARROW, J.A.:—The agreement was intended to be carried into effect in Ontario; the parties must be presumed to have intended to submit themselves to the law of Ontario, which must therefore govern; and the agreement was obnoxious to the law of Ontario respecting champerty and for that reason void. But, if the proper conclusion as to forum was otherwise, the Court here is not bound to enforce an agreement made in a foreign country, even though valid there, which is contrary to the law of this Province.

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ACTION to set aside an agreement made between the plaintiff and the defendant Taugher, in the circumstances stated below, and for other relief.

March 4 and 5. The action was tried by KELLY, J., without a jury, at Toronto.

C. A. Moss and *S. King*, for the plaintiff.

I. F. Hellmuth, K.C., for the defendant Taugher.

C. S. MacInnes, K.C., for the defendants the National Trust Company Limited.

August 7. KELLY, J.:—The plaintiff is the widow of James A. MacMahon, son of the late Honourable Hugh MacMahon. The defendant Taugher is an attorney-at-law, who, at the time of the making of the agreement out of which this action has arisen, was a resident of the city of San Francisco. The defendants the National Trust Company Limited are the executors of the will of the late Honourable Hugh MacMahon, which will bears date the 2nd September, 1910.

The testator died on the 18th January, 1911, and probate of the will issued from the Surrogate Court on the 14th March, 1911.

The plaintiff's husband, James A. MacMahon, died in California on the 16th March, 1910.

By the said will, the testator, after making provision for his wife holding during her lifetime certain articles of furniture, silverware, etc., and for payment to her of a sum of \$600, directed his executor to invest the balance of the moneys of his estate, and to pay his wife in quarterly payments the income arising therefrom, as well as a sum of \$300 annually out of the corpus.

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The will then proceeds as follows: "On the death of my wife I direct that the interest arising out of the moneys then existing be paid in quarterly payments to my son D'Arcy Hugh MacMahon during his life but he shall have no power to anticipate mortgage incumber or alienate the same or any part thereof and on his decease I direct that the fund then remaining be paid to Stella MacMahon widow of my son James Alexander. But should the said Stella predecease my said son D'Arcy Hugh he is hereby empowered to appoint by deed or will the balance of the fund remaining at his decease and in default of such appointment to my niece Ella MacMahon of Dundas."

The testator's widow died on the 18th June, 1911, and his son D'Arcy Hugh died on the 8th July, 1913. At the time of all these occurrences and for some time prior thereto, the plaintiff was a resident of the State of California.

The defendant Taugher, formerly a resident of Ontario, was called to the Bar of this Province in 1900, and, having practised here as a solicitor for a short time, he left the Province and engaged in the practice of law successively in Seattle, in the State of Washington, in the State of Montana, in the city of Portland, in the State of Oregon, and in the city of San Francisco, in the State of California. He states that he is a naturalised citizen of the United States.

According to the evidence of the plaintiff, she first became aware of the death of Mrs. MacMahon, widow of the testator, and of the benefits intended for her by the will, in November, 1911, when a communication reached her asking her to consent to payment out of the assets of the testator's estate of the expenses connected with the death of Mrs. MacMahon. Her own testimony is, that with the object of ascertaining if it were possible for her to borrow money upon her position under the will, she consulted a lawyer in San Francisco. Not having been successful, and having, as she says, become aware that the defendant Taugher had been admitted to practise at the Bar of Ontario, and was therefore familiar with the laws of that Province, and understanding, as she also says, that members of the Ontario Bar had the reputation of being of high standing and trustworthy, she sought and obtained an in-

terview with him in December, 1911. Her financial condition at that time was bad; she says it could not well have been worse; she was without means except such as she derived from her personal earnings at office work; and she was in a poor state of health, and in fear of having, in nursing her husband through a long illness preceding his death, contracted tuberculosis. Her interview with the defendant Taugher was for the purpose of raising or procuring money on her prospects under her father-in-law's will, as well as to consult him on the advisability of consenting to the estate contributing to the funeral expenses of Mrs. MacMahon. Taugher says that any reference to the payment of the funeral expenses was only incidental, and that it was not a subject of advice. Whatever may have been the object of her seeking out and consulting with Taugher, he told her that he would first have to see a copy of the will under which she claimed, as well as that of Mrs. MacMahon, the testator's widow. Her statement is, and I accept it, that Taugher asked her if she would not care to get some money presently from the estate, and not wait for "dead men's shoes," as he put it. She fell in with this suggestion, and told him the value of her father-in-law's estate, and that she had absolutely no money.

About the beginning of February, Taugher received the documents from Toronto, and negotiations were entered into between them with the object of his seeking on her behalf to effect a settlement, compromise, or agreement by which she would receive some immediate benefit from the estate, and providing for his remuneration for his services. The matter was discussed by them at his office, and a draft agreement was prepared, by the terms of which he was to have received one-half of any sum or amount agreed to be paid to her for her interest in the estate.

A copy of this draft agreement was given to the plaintiff with the request by him, as she says, that she shew it to her friends; Taugher says that he added, "preferably to an attorney;" this the plaintiff does not deny. The draft was partly, at least, prepared in the plaintiff's presence.

Having kept it in her possession for about ten days, during which time she did speak of it to her friends, but did not consult an attorney, she returned it to Taugher and took exception to

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his receiving 50 per cent. if D'Arey Hugh MacMahon should die before the contemplated settlement was completed. He admitted that that amount of remuneration was excessive if D'Arey Hugh MacMahon should die within a short time, and the draft agreement was then amended by providing that "in the event that said D'Arey Hugh MacMahon die before any compromise or settlement of the aforesaid matters be consummated, then and in that event the said Stella MacMahon agrees to assign, transfer, and set over unto the said J. L. Taugher one-fourth (25 per cent.) of the whole amount of her interest in and of all the money that she shall become entitled to by or under the will of the Honourable Hugh MacMahon, deceased." Thus amended, the agreement dated the 16th March, 1912, was executed. At the same time, Taugher obtained from her a power of attorney, by which he was given the very widest powers of entering into any agreement or compromise with D'Arey Hugh MacMahon in relation to her interest in the estate, and of selling, assigning, disposing of, etc., her interest, present and contingent, therein.

Taugher entered into correspondence with Mr. Smellie, his representative in Toronto, with the object of opening up negotiations with D'Arey Hugh MacMahon, and Mr. Smellie got into communication with Mr. Rose, who had acted as solicitor in other matters for MacMahon—the latter being then absent from the country. From the very first Mr. Rose disapproved of any proposal tending to a compromise of or interference with the provisions of the will in so far as they related to his client, and he so expressed himself to Mr. Smellie. This was communicated to Taugher and by him to the plaintiff.

Taugher's next suggestion was, that he or his representative get into communication directly with D'Arey Hugh MacMahon; with that end in view they obtained his foreign address. Little, if anything, was done in the matter from October, 1912, until May, 1913, when the plaintiff called at Taugher's office for some papers of hers. The proposed settlement or compromise was then again discussed. Taugher intimated his intention of going to Europe within a short time thereafter, when he would, if possible, go to D'Arey Hugh MacMahon, who was then in Europe, and enter into negotiations with him personally. The

plaintiff did not disapprove of this. Taugher did go to Europe, but he made no effort to see D'Arcy Hugh MacMahon or get into communication with him; in fact he did nothing further until MacMahon's death in July. On learning of the death from a friend in Canada, the plaintiff consulted a solicitor, who soon afterwards gave notice to Taugher that she revoked the power of attorney and disclaimed any rights of his under the agreement.

In August, 1913, notice on behalf of Taugher was given to the National Trust Company Limited of his claim under the agreement, with an intimation that legal action would at once be taken to secure and realise what he claimed to be entitled to and to protect his rights. This was followed on the 22nd August by a further notice to the company that he claimed the right to have the estate of the Honourable Hugh MacMahon paid over to him to be distributed by him, that any payment to or dealing with the plaintiff or on her account inconsistent with this claim would be objected to, and that in carrying out the trusts of the will the company should pay over what the plaintiff is entitled to, to Taugher, and deal with him, leaving him to account to her.

The present action is brought to have the agreement set aside and declared null and void; for a declaration that Taugher is not entitled to the 25 per cent. claimed; and a declaration that the plaintiff is entitled to the whole of the estate, subject only to the payment of the proper charges and disbursements of the executors, basing her claim upon the ground that the agreement was procured by Taugher, who, she alleges, was her attorney, without her having independent advice, and by deceit and over-reaching. She also alleges that long prior to the death of D'Arcy Hugh MacMahon negotiations looking to any division of the estate had ceased, and further efforts in that direction were not contemplated, and, to the knowledge of Taugher, would have been of no avail—that in effect the whole matter had been considered at an end.

On the 5th August, 1913, the plaintiff wired from Toronto to Taugher, who was then in New York, a notice that she had revoked the power of attorney to him, and on the same date her present solicitor wrote him, repeating the telegram, and inti-

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mated a willingness to pay any reasonable expenses Taugher might have incurred on her behalf.

Apart from the questions of fact to be determined, several questions of law are involved and were raised at the trial—the validity of agreements providing for contingent fees, the liability and duties of an attorney arising from the relationship of attorney and client, the right to maintain this action in its present form in view of the provisions of the Solicitors Act, 2 Geo. V. ch. 28, sec. 56 *et seq.* (now R.S.O. 1914, ch. 159, sec. 56 *et seq.*)

The evidence of a number of attorneys-at-law in San Francisco, men of long professional experience, was taken on commission and submitted at the trial.

On the question of the validity of agreements entered into by attorneys-at-law in that State providing for the payment of contingent fees, this evidence suffices to shew that such agreements have been upheld by the Courts of that State, and that such contracts may there be made. Other evidence of these witnesses was directed to the question of the relationship between an attorney and his client, and the obligation of the attorney towards the client, with respect to the good faith required of him from the time the relationship is established; the opinions expressed by these witnesses being supported by decisions of the California Courts cited in their evidence.

I refer particularly to *Cox v. Delmas* (1893), 99 Cal. 104, in which it was laid down that “the relation between attorney and client is a fiduciary relation of the very highest character, and binds the attorney to most conscientious fidelity”—a statement much as would be enunciated in our own Courts. The judgment (at p. 124), taking a view the most favourable to the attorney, adds: “The attorney must shew affirmatively that he gave full and proper advice in the premises, acted with entire fairness throughout the transaction, and took no advantage of his client;” so that the fair deduction to be drawn from the evidence of these witnesses on the law of the State of California is, that the attorney who bargains in a matter of advantage to himself with his client is bound to shew that the transaction is fair and equitable, that the client was fully informed of his rights and

interests in the subject-matter of the transaction, and the nature and effect of the transaction itself, and was so placed as to be able to deal with the attorney at arm's length—the general principle there governing this class of cases and forming the basis of the rule being, that, if a confidence is reposed and that confidence is abused and the other party suffers an injury thereby, the Court will grant relief.

But, while these witnesses in general terms agree upon this view of the law as it exists in their State, they in effect also agree that the strict duty required of the attorney when the relationship of attorney and client has been established does not arise in the making of a contract by which the relationship is originally created and the attorney's compensation is fixed. This is supported by the decisions of the California Courts to which reference is made in the depositions of these witnesses.

In *Cooley v. Miller & Lux* (1909), 156 Cal. 510, which may fairly be taken to embody the opinions of these professional witnesses on this subject, the head-note contains this: "The relation of attorney and client is confidential in character, and any contract entered into between them while that relation continues, whereby the attorney obtains an advantage from the client, is presumed to have been made by the client under the undue influence of the attorney. The presumption does not apply to a transaction in which the attorney openly assumes a hostile attitude to his client, nor to a contract by which the relation is originally created and the compensation of the attorney fixed."

Unless in the excepted instances thus given, the burden is thrown upon the attorney of satisfying the Court that the dealings between him and his client have been conducted with that degree of straightforwardness, candour, and good faith which the relationship of attorney and client involves. As put by Mr. Henley, one of these witness, after that relationship has been established, the burden of proof shifts, and before a lawyer can recover he must prove that everything was fair and above-board.

Had the relationship of attorney and client been established between these parties before the making of the contract now in issue? And, if so, did the attorney fulfil the obligations involved in that relationship?

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To answer these questions properly, the sequence of events leading up to the agreement must be considered. The suggestion, to adopt the scheme afterwards embodied in the written agreement, and which was made when the plaintiff went to Taugher to be advised about payment of the funeral expenses and to raise money if possible, was his, not hers. Copies of the wills of the Honourable Hugh MacMahon and of Mrs. MacMahon, his widow, were procured from Toronto so as to enable Taugher the better to advise the plaintiff. He contends that this advice was in respect of the feasibility of dissolving the trust under the will and so obtaining an immediate benefit out of the estate for the plaintiff, and he takes the position that he was not asked to advise and did not advise on the question of funeral expenses, but only in respect of the proposed compromise with D'Arcy Hugh MacMahon; and that anything that happened in regard to the question of funeral expenses was only, as he puts it, incidental and did not establish the relationship of attorney and client between him and the plaintiff; and, further, that such relationship was not established until the agreement now in controversy had been made.

The plaintiff, on the other hand, insists that the proposal made to her as to contributing to the funeral expenses was the very matter on which she had sought Taugher's professional advice and, in which he did advise her, and that he was from the time of the first interview, *de facto*, her attorney—that the object of his writing to Toronto for copies of the wills was that he could advise her on this very point.

Taugher's contention, moreover, is met by his own written admissions, which establish fully to my satisfaction, if I had had any doubt of the truth of the plaintiff's evidence—which I have not—that he acted from the beginning as her attorney. On the 3rd February, 1912, after he had received from Toronto copies of the documents (the wills, etc.), he wrote to the plaintiff expressing surprise, in view of what the documents contained, that she should be asked to consent to payment of the funeral expenses, and asking her to call upon him, as he would like to take up with her a communication he had received, in respect to this very matter. Not a word of any other business but that—the very

transaction on which the plaintiff says he was advising her, and not merely something incidental to the scheme embodied in the agreement.

It is not without significance, too, that in a letter of the 2nd March, 1912 (two weeks before the agreement was executed), to his representative in Toronto, whom he retained to negotiate the settlement or compromise, he more than once refers to the plaintiff as his client; and in the following sentence, referring to a letter he proposed writing to the Toronto solicitors who asked the plaintiff's consent to payment of the funeral expenses, he refers to himself as her attorney: "I will tell . . . that I am from Osgoode and that I was in your office. Probably some one from that firm will call you up to discover how hard a bargain they can drive with Mrs. MacMahon's attorney. In the event they do telephone you, you might assure them that I am not 'easy'."

Notwithstanding his denial that the relationship of attorney and client existed between them until the agreement had been made, facts well established are against him, and are opposed to his contention. When I consider the evidence of the plaintiff, given throughout with the greatest of candour and straightforwardness, and without any appearance of a desire to overstate her own position, and the deductions to be drawn from Taugher's correspondence, as well as from other circumstances, I find it impossible to reach any other conclusion than that from the end of December, 1911, or the beginning of January at least, his relation to the plaintiff was that of an attorney to his client, and that he so considered himself and held himself out. One cannot overlook, too, that this defendant, with his trained mind and an evident keenness in pursuit of his claim, shewed unmistakable appreciation of the legal obligation which his position as the plaintiff's attorney and legal adviser cast upon him, if it should be proved that such relationship existed between them when the agreement was entered into.

The relationship having been, as I find, so established, the next consideration is: Did Taugher discharge the obligations to the plaintiff which his fiduciary relationship towards her demanded? As expressed in *Cox v. Delmas*, 99 Cal. at p. 123,

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citing from *Gibson v. Jeyes* (1801), 6 Ves. 266, 278, one of these obligations is that if the attorney on his own account has any transaction with his client about the subject of the litigation, he must with reference to such transaction be able to give and must give to his client "all that reasonable advice against himself that he would have given her against a third person."

Not only was the plaintiff entitled to the protection that this expression of the law indicates, but the confidence she reposed in Taugher was based on unusual circumstances. The very reason for her selecting and retaining and consulting him—and that reason was made known to him—rested on the confidence which she understood could be reposed in him as an Ontario lawyer. She had the utmost confidence in him and implicitly relied upon him. She had no male friend or adviser, in fact, no friends except one woman friend, as was made known to Taugher. She had had no experience in legal matters; she was without knowledge of business affairs, except such as she acquired from having been employed for a time as a clerk in a book publishing house; her financial condition could not have been worse than it was; her health was not good, and she had fears of having contracted an illness which might prove fatal. She had no money for present payment of her attorney for his services. He, an attorney of some years' standing, keen and shrewd, proposed the scheme of attacking the trust created by the will of her father-in-law, or a compromise which would result in getting some immediate or early benefit from the estate, one-half of which he would receive as his remuneration for his services, his statement to her being that that amount was customary in such cases. He advised her against returning for her papers to the attorney whom she had interviewed before she called upon him. She relied upon him throughout, and in March the agreement was prepared under the circumstances detailed above; and, having had it in her possession, the only objection that occurred to her to make was as to the amount that Taugher should receive in the event of D'Arcy Hugh MacMahon's death before the contemplated settlement or compromise was effected. The agreement is signed, and Taugher then advises her not to shew it to her friends, as they are prone to give advice.

The power of attorney given at the time the agreement was executed is of the broadest and most comprehensive character, giving the attorney the most absolute powers of dealing with the plaintiff's interest in the estate.

Were these documents such as a prudent and careful attorney—one fully appreciating his duty to his client—would or should advise or permit that client to execute? I am forced to answer in the negative; and I would be slow to believe that if the defendant Taugher had been consulted by the plaintiff as to executing such documents in a transaction between her and another attorney, he would have advised their execution. My conclusion is, that, the relationship of attorney and client having been established before the making of the agreement, that relationship cast upon the defendant Taugher an obligation and duty towards the plaintiff which he failed to perform, and, as a consequence, the agreement cannot be enforced against the plaintiff. This is in accordance with the law of California, as I understand it from the evidence submitted and the authorities cited; and it is not out of harmony with the state of the law in this Province. A contract such as this, entered into here under similar circumstances, would not be upheld.

This renders it unnecessary to discuss further the question raised on the argument as to whether the matter should be determined under the law of California, where the contract was made, or subject to the law of this Province.

No end is to be served by going into the happenings subsequent to the making of the agreement, except in so far as they help to throw light on the antecedent occurrences and the intention and object of the defendant Taugher in making the agreement. Between the latter part of December, 1911, and the 16th March, 1912, the date of the agreement, some correspondence passed between him and his Toronto representative about the proposed attack on the trust, or settlement with D'Arey; and from the latter date until the 14th June, 1912, this correspondence was continued with varying intervals, the Toronto representative having also had interviews with D'Arey Hugh MacMahon's solicitor on the subject. On the 14th June, this representative wrote Taugher that D'Arey's solicitor had that day

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“finally turned down” any further consideration of the proposal that had been made to him. Taugher’s interest did not take the form of even a reply to that letter until the 24th August, and thereafter nothing further happened until the 11th October. From August until D’Arcy’s death, Taugher had no direct dealings with any of the parties, except the interview with the plaintiff in May, 1913, and the only evidence of any action on the part of his Toronto representative was a letter to D’Arcy’s solicitor and another to Taugher on the 11th October, 1912, and the obtaining of D’Arcy’s address from his solicitor in December and the communicating of it to Taugher. From the 12th August, the negotiations were practically at an end; efforts in that direction appear to have been considered futile, so much so, indeed, that the defendant Taugher, though he went to Europe soon after the interview between the plaintiff and him in May, 1913, made no effort to get into touch with D’Arcy Hugh MacMahon.

A deduction easily made is either that, on the refusal in June, 1912, of D’Arcy’s solicitor further to consider a compromise, Taugher treated the matter as at an end, or that he was content to take no further active step in the plaintiff’s interest, but quietly sit by and await results. If D’Arcy survived the plaintiff without a compromise or settlement having been effected, Taugher’s loss would be the value of the services he rendered down to June, 1912, and which, so far as can be gathered from the evidence, was not serious. If, on the other hand, the plaintiff survived D’Arcy, he would then assert his claim to 25 per cent. of the estate—an amount out of all proportion to the services rendered. Had he displayed the same activity and earnestness in the performance of the services called for by the agreement as he has exercised in his effort to sustain the agreement and in the prosecution of his claim against the plaintiff, his services would have entailed upon him much more labour and outlay than he devoted to the plaintiff’s interests, and he could with a greater semblance of sincerity now urge the *bona fides* of his intentions in making the agreement.

The question of whether the agreement is void by reason of impossibility of performance is one which, in view of my findings

on other grounds, need not be dealt with. Not a little evidence was directed to shew that the trust in favour of D'Arcy Hugh MacMahon could not have been legally set aside or varied (and this to the knowledge of the defendant Taugher), and in consequence that the agreement was one which could not have been performed. Interesting as is the discussion of this question in the evidence of the professional witnesses, I am inclined to the opinion, if a decision were necessary (though these witnesses do not altogether agree as to the character of the impossibility that renders a contract void), that this agreement could not be successfully attacked on that ground alone.

A further contention raised by this defendant is on the right of the plaintiff to have the question of his remuneration disposed of by action and not under the provision of the Solicitors Act. This, in my view, could not have been determined by the machinery provided by that Act, the provisions of which were not intended to apply, and do not apply, to a set of circumstances such as have arisen in the present case. Moreover, the defendant Taugher having by notice denied the right of the plaintiff to receive any part of the estate of which the defendant company are the trustees, except by payment to be made through him, and having expressly forbidden his co-defendants making any payment to the plaintiff, and having thus tied up the assets of the estate, the plaintiff did not exceed her rights in proceeding by this action to have the question in dispute determined, and thus obtain a judicial declaration as to the distribution of these assets by the trustees, whose hand had been stayed by the claim made by their co-defendant and by his prohibition against their making payment to her.

In view of the intimation given by the plaintiff's solicitor to Taugher before action, of the plaintiff's willingness to give consideration to any reasonable account for any services he had rendered for her, I suggested to counsel at the close of the hearing the advisability of the parties coming to an amicable arrangement; and judgment has, therefore, been withheld to enable them to confer. Ample time has been given for that purpose, but without result. I have learned from the solicitors for both parties that an offer had been made by the plain-

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tiff of a sum which, in my view, would have been much more than a generous remuneration for any and all services performed, so far as these services and their value are revealed in the evidence. But Taugher, as if to say, "I'll have my bond," prefers to rely upon the merits of his case and his strict legal rights.

Judgment will be in favour of the plaintiff, declaring that the defendant Taugher is not entitled to 25 per cent. of the estate of the late Honourable Hugh MacMahon, nor to any part thereof, and that as between them the whole estate belongs to the plaintiff; and that the agreement entered into between the plaintiff and him is null and void and should be set aside. The defendant Taugher will pay the costs of the action, both of the plaintiff and of his co-defendant.

The defendant Taugher appealed from the judgment of KELLY, J.

October 15, 16, and 19. The appeal was heard by MEREDITH, C.J.O., GARROW, MACLAREN, MAGEE, and HODGINS, JJ.A.

I. F. Hellmuth, K.C., for the appellant. No relationship of solicitor and client existed between the plaintiff and the appellant until after the making of the agreement between them which is now in question; and, even if such a relationship should be deemed to have existed, there was no overreaching on the part of the appellant. The plaintiff did take advice as to signing the agreement before doing so, and her evidence on this point is disingenuous. The first draft of the agreement fixed the remuneration at 50 per cent. of the amount recovered, and when this was objected to by the plaintiff, a reduction to 25 per cent. was agreed to by the appellant. Under the law of California, "the measure and mode of remuneration" are left to the agreement of the parties: *Ransom v. Ransom* (1911), 167 N.Y. St. Repr. 173; California Code of Civil Procedure, p. 275, art. 1021. There is no doubt that such an agreement can be set aside on the ground of fraud, but it is no evidence of fraud that the remuneration fixed by the agreement may appear to be grossly excessive. The plaintiff was made aware of everything that took place, and

consented to negotiations being kept up with D'Arey MacMahon till the time of his death. These negotiations were "pending," in the sense that they had not been abandoned. It is submitted that it was always understood between the parties that the remuneration was to be upon a contingent basis; everything that was done related back to this understanding; and the relationship of solicitor and client did not exist until after this understanding was put in the shape of the agreement which is before the Court.

C. A. Moss and O. H. King, for the plaintiff, respondent, argued that the intention of the parties was that the agreement was to be governed by the law of Ontario, according to which it is conceded that it cannot stand. They referred to 2 Geo. V. ch. 28, sec. 49 (O.); *Re McBrady and O'Connor* (1899), 19 P.R. 37; Cordery on Solicitors, 2nd ed., p. 230. The agreement is, moreover, invalid as being against public policy, and therefore should not be enforced here in any event: *Kaufman v. Gerson*, [1904] 1 K.B. 591, approved in *Société des Hôtels Réunis v. Hawker* (1913-4), 29 Times L.R. 578, 30 Times L.R. 423. Reference was also made to *Robertson v. Furness* (1878), 43 U.C.R. 143; *Spiers v. Hunt* (1907), 24 Times L.R. 183; *Hope v. Caldwell* (1871), 21 U.C.C.P. 241; *Robertson v. Caldwell* (1871), 31 U.C.R. 402; *Atkinson v. Gallagher* (1876), 23 Gr. 201; Halsbury's Laws of England, vol. 7, pp. 394-396. It is not necessary for us to shew that the relationship of solicitor and client existed in order to succeed, as the agreement was grossly unfair and unconscionable. They referred to *Egerton v. Earl Brownlow* (1853), 4 H.L.C. 1; *Richardson v. Mellish* (1824), 2 Bing. 229, 242; *Besant v. Wood* (1879), 12 Ch. D. 605, 620; *Davies v. Davies* (1887), 36 Ch. D. 359, 364; *James v. Kerr* (1889), 40 Ch. D. 449, 456; *O'Connor v. Gemmill* (1899), 26 A.R. 27; *Wallis v. Duke of Portland* (1797), 3 Ves. 494, 503; *Grell v. Levy* (1864), 16 C.B.N.S. 73; *Hamlyn & Co. v. Talisker Distillery*, [1894] A.C. 202; *South African Breweries Limited v. King*, [1899] 2 Ch. 173, [1900] 1 Ch. 273; *British South Africa Co. v. De Beers Consolidated Mines Limited*, [1910] 1 Ch. 354.

C. S. MacInnes, K.C., for the defendants the National Trust Company Limited, respondents.

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Hellmuth, in reply, referred to *The Queen v. Doutre* (1884), 9 App. Cas. 745, 752; *Hyams v. Stuart King*, [1908] 2 K.B. 696, 710, 726, 727.

December 21. MEREDITH, C.J.O.:—This is an appeal by the defendant Taugher from the judgment dated the 7th August, 1914, which was directed to be entered by Kelly, J., after the trial of the action before him, sitting without a jury, at Toronto, on the 4th and 5th March, 1914.

In the reasons for judgment of the learned Judge the principal facts are stated, and it is therefore unnecessary for me to repeat them.

It is not necessary, in my view, to decide whether the validity of the agreement in question and the rights of the parties under it are to be determined by the law of Ontario or by that of California, for in either case the nature and terms of the agreement and the circumstances under it was entered into are such that it must be held to be extortionate and unconscionable so as to be inequitable against the respondent MacMahon and not binding upon her.

As I understand the testimony of the witnesses who gave evidence as to the law of California, it is lawful there for an attorney to undertake to institute and carry on proceedings for the recovery of property and to stipulate with his client for a contingent fee, as it is called, which may be a part of the property or a part of the value of it; and that, where the business is undertaken after the relation of attorney and client has been established, the onus rests upon the attorney of proving that the bargain was a fair one; but, if the business is undertaken before that relation is established, the validity of the agreement is to be determined according to the law applicable to contracts between parties who do not stand in that relation to one another, and that the law applicable in the latter case does not differ from the law of England.

It was argued that the validity of the agreement and the rights of the parties under it are to be determined according to the law of Ontario, and that by that law the agreement is champertous and void. It is unnecessary, in the view I take, to de-

cide whether or not this contention is well-founded; for, even if the agreement is not champertous, the respondent MacMahon is entitled to have it set aside, for the reasons I shall afterwards mention.

I may say, however, that I do not share the views expressed by Lord Chancellor Cottenham in *Strange v. Brennan*. (1846), 2 Coop. temp. Cott. 1. In that case an agreement had been entered into between the plaintiff Strange, an Irish attorney and solicitor, and the defendant, who as next of kin to a deceased intestate was entitled to certain consols, which provided that, in consideration of the attorney and solicitor making the disbursements necessary for taking out letters of administration, finding the sureties required by the Ecclesiastical Courts, and causing legal proceedings to be instituted and prosecuted in England, and making the advances necessary for that purpose, the defendant should out of the consols when recovered reimburse the plaintiff all the moneys he should lay out and should also pay him a bonus of 10 per cent. on the amount of the consols recovered; and the suit was brought for the purpose of having it declared that the agreement was valid and binding and for the specific performance of it. A demurrer to the bill, for want of equity, was allowed by the Vice-Chancellor (1846), 15 Sim. 346, on the ground that the agreement was champertous, and an appeal from his decision was dismissed by the Lord Chancellor. In delivering judgment the Lord Chancellor said, "that the agreement was one, no matter where made, no matter what the character of the parties, to which the Court would not give effect. The agreement was champerty, and considering that the plaintiff Strange was an attorney and solicitor, and that the defendant was his client, and that the duty of an attorney and solicitor in Ireland, as every one knew, in no respect differed from the duty of an attorney and solicitor in England, it was champerty of a shocking kind. That he did not know of any country in which this agreement would not be viewed in the same light. The duty of an attorney and solicitor must everywhere be substantially the same. He could not, therefore, think that the laws of any country would tolerate an agreement like the present."

I prefer the view expressed by Sir Montague E. Smith in

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delivering the judgment of the Judicial Committee of the Privy Council in *Ram Coomar Coondée v. Chunder Canto Mookerjee* (1876), 2 App. Cas. 186. In that case it was decided that the English laws of maintenance and champerty were not of force as specific laws in India, and Sir Montague E. Smith said (p. 209) that, while that was the case, it seemed clear upon the authorities that contracts of that character ought under certain circumstances to be held to be invalid as being against public policy, and added (p. 210): "Their Lordships think it may properly be inferred from the decisions"—to which he had referred—"that a fair agreement to supply funds to carry on a suit in consideration of having a share of the property, if recovered, ought not to be regarded as being, *per se*, opposed to public policy. Indeed, cases may be easily supposed in which it would be in furtherance of right and justice, and necessary to resist oppression, that a suitor who had a just title to property, and no means except the property itself, should be assisted in this manner. But agreements of this kind ought to be carefully watched, and when found to be extortionate and unconscionable, so as to be inequitable against the party . . . effect ought not to be given to them."

The trend of modern opinion is against the view expressed by Lord Cottenham and in accord with that expressed by Sir Montague E. Smith; and in many of the States of the neighbouring Republic an attorney and his client may lawfully agree that the attorney's compensation for services rendered in recovering property for his client shall be a part of the property or a proportion of its value, and that such an agreement is valid and binding upon the client, subject always to the condition that the compensation is not extortionate and unconscionable so as to be inequitable against the client; and, although such agreements are not valid according to the law of Ontario, there are many who think that no harm would be done if a similar latitude were by legislation allowed to solicitors in this Province.

A bare statement of the effect of the agreement in question in this case is enough to shew that it was an extortionate and unconscionable agreement. It is true that the contingent interest to which the respondent MacMahon was entitled was such that it

was possible, and indeed in view of the state of her health probable, that she would never become absolutely entitled to anything. What it was in the contemplation of the parties to effect by the employment of the appellant was the making of an agreement with D'Arcy MacMahon, another beneficiary under the will, by which a present division of the estate between him and the respondent MacMahon might be brought about, and it was thought, whether rightly or not, it is unnecessary to consider, that if the two of them were to come to an agreement nothing would stand in the way of that object being accomplished. What the agreement provides for is, that, in the event of an agreement being come to which should result in the respondent MacMahon getting anything out of the estate, the appellant should be entitled to one-half of it for his services and any expenses he might have been put to, and that, if no agreement should be come to, or perhaps if after negotiation had so far progressed that the making of an agreement was in sight, D'Arcy MacMahon should die and the respondent MacMahon should become entitled under the terms of the will to the whole of the estate, the appellant should receive for his services and outlay one-fourth of the estate which should come to her.

It was not the case of the employment of an attorney to recover an estate which would involve his entering upon litigation, perhaps long and expensive, but an employment merely to endeavour to effect an agreement, of the character I have mentioned, with D'Arcy MacMahon, and possibly, if that became necessary, to bring a friendly action to protect the executor and trustee for giving effect to the agreement.

It might well have happened, and in fact did actually happen, that after the writing of a few letters it would be ascertained that no agreement could be come to with D'Arcy MacMahon; and all that, in the event of that happening, the appellant had to do, was to sit down and wait until his client or D'Arcy MacMahon died; when, if his client outlived D'Arcy MacMahon, the appellant would step into the enjoyment of one-fourth of the estate; or, if his client died first, he would get no compensation for his trouble in writing the letters and the small expenditures he might have incurred.

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But, even if an agreement had been come to with D'Arcy MacMahon, the compensation for which the appellant stipulated was out of all proportion to any services it was at all likely that he would be called upon to render.

The respondent MacMahon was, no doubt, a bright, intelligent woman and had some knowledge of business, and it appeared that she was alive to the unfairness of having to pay one-half of what she should receive if she became entitled to the estate by its falling into her in consequence of D'Arcy MacMahon predeceasing her; and it is manifest that no lawyer, except one with whom she was making such a bargain, would have advised her to enter into the agreement. In addition to these considerations, she was, as the appellant knew, in dire straits for money, out of employment, and dependent on the generosity of a friend for even the means of subsistence, as well as in bad health, and therefore likely to jump at anything which seemed to promise even the chance of getting money, regardless of the price she was to pay for it.

In bargaining with such a woman, and a woman so circumstanced, every principle of fair dealing demanded that, before exacting such a price for his services as the appellant stipulated, he should have taken care to see that she thoroughly understood not merely the terms but the effect of the agreement she was entering into, and that he did not do; and, even if he had done all this, he cannot escape from the position of having exacted from her an agreement which required her to pay him for his services a compensation which he must have known was grossly in excess of the value of any services he was likely to be called upon to render.

For these reasons, I would affirm the judgment and dismiss the appeal with costs.

MACLAREN, MAGEE, and HODGINS, JJ.A., agreed.

GARROW, J.A.:—Appeal by the defendant Taugher from the judgment, in favour of the plaintiff, of Kelly, J., where the leading facts are stated.

As will be seen, Kelly, J., based his conclusion in favour of

the plaintiff upon the ground that, when the agreement in question was made, the relation of solicitor and client existed, and that, according to the laws of the State of California, where the agreement was made and the parties then resided, the agreement could not be upheld.

On the argument before us, counsel for the appellant contended, among other things, that the finding of fact that the relationship of solicitor and client then existed was erroneous, and that the agreement was a perfectly valid agreement according to the laws of the State of California as disclosed in the evidence taken under commission. Counsel for the plaintiff, in addition to upholding the conclusions of Kelly, J., contended that the agreement should be construed according to the law of this Province, where, by its terms, it was intended to be performed; and that, judged by such law, the agreement should be held void as being in its nature champertous.

With reference to the question of fact, I incline to agree with the conclusion reached by Kelly, J.; that is, it seems to me that the weight of evidence favours the view that before the execution of the agreement the relationship of solicitor and client had been established. The point, however, is, as will be seen, in the view hereafter presented, one of minor importance.

The rule, doubtless, is that the *lex loci contractus* governs in personal contracts, but to that rule there are numerous exceptions. The rule itself is stated, with his usual precision and authority, by Willes, J., delivering the judgment of the Exchequer Chamber in *Lloyd v. Guibert* (1865), L.R. 1 Q.B. 115 (at p. 122), thus: "It is, however, generally agreed that the law of the place where the contract is made, is *primâ facie* that which the parties intended or ought to be presumed to have adopted as the footing upon which they dealt, and that such law ought therefore to prevail in the absence of circumstances indicating a different intention, as for instance, *that the contract is to be entirely performed elsewhere*, or that the subject-matter is immovable property situate in another country, and so forth."

This statement of the law has since been more than once quoted and approved in the English Court of Appeal. See *per*

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Bowen, L.J., in *Jacobs v. Crédit Lyonnais* (1884), 12 Q.B.D. 589, at p. 600; *per* Fry, L.J., in *In re Missouri Steamship Co.* (1889), 42 Ch. D. 321, at p. 340.

When the parties have not stipulated for a particular forum, as they may do (see *Hamlyn & Co. v. Talisker Distillery*, [1894] A.C. 202), an element of much importance always is whether the contract is to be wholly performed in a country other than that in which it was made; for, if it is, *primâ facie* at least, the place of performance will govern. See *per* Lord Esher, M.R., in *Chatenay v. Brazilian Submarine Telegraph Co.*, [1891] 1 Q.B. 79, at p. 83.

The agreement was evidently intended to be carried into effect in this Province. It could not in fact have been carried into effect elsewhere, for the trust was created in Ontario, and the estate held in trust was, and had always been, here, as was also the trustee. And the object of the agreement, expressed on its face, was "dissolving the now remaining trusts . . . and causing the money and property belonging to the estate of the late Hugh MacMahon, or mentioned in his said will, to be divided in such proportions as may be agreed upon between the said Stella MacMahon, acting through her said attorney, J. L. Taugher, and the said D'Arcy Hugh MacMahon and the trustee acting under the said will, and that the approval of other persons interested therein and of the proper tribunal of the Province of Ontario be obtained to legally accomplish such division of said estate and the distribution thereof;" objects which could clearly only be accomplished in Ontario.

In addition, the agreement contains a provision in the following terms: that "if for any reason whatever it might be held that the foregoing agreement be repugnant to any law existing in the Province of Ontario, and this method of paying for legal service might not be approved of by the Court of Ontario, it is in such event agreed," etc., the substituted agreement being for a retainer of \$3,000 and disbursements.

Under all the circumstances it seems to me, therefore, very clear that the parties intended, or must be presumed to have intended, to submit themselves to the law of Ontario, and that the law of that Province must govern. And, if that is a correct

conclusion, the agreement seems to be obnoxious to the law of the Province respecting champerty and for that reason void. Indeed the same result would follow if the proper conclusion as to forum was otherwise, for we are under no obligation here to enforce agreements made in a foreign country, even although perfectly valid there, which are illegal by the law of this Province: see *Robinson v. Bland* (1760), 1 W. Bl. 256; *Grell v. Levy*, 16 C.B.N.S. 73; *Hope v. Hope* (1857), 8 DeG. M. & G. 731, 743.

But even these questions, however determined, are really all of secondary importance, since we are all, I understand, of the opinion that, however viewed, or by whatever law adjudged, the agreement is one which upon its merits cannot be upheld in any Court, either here, or, so far as we can see from the evidence, in the State of California, where the law, except in the one particular of enabling agreements for contingent fees to be made, does not seem to be materially different from our own. The evidence discloses a very clear case of gross advantage taken by the appellant of the plaintiff's ill-health and poverty to obtain for himself a benefit out of all reasonable proportion to any possible services which he as an attorney could render, in the circumstances, to the plaintiff.

The estate in Ontario was valued, roundly, at \$30,000. D'Arcy MacMahon was entitled to the income for life, with power to appoint in case the plaintiff, to whom the estate was left in remainder, did not survive D'Arcy MacMahon. And if she predeceased him, and he made no appointment, the whole was to pass to the testator's niece Ella MacMahon.

The plaintiff, therefore, was entitled to nothing immediately, and might never become entitled. No litigation could improve her position, and no compromise was likely to yield more than a trifling sum, that is, such a sum as might be extracted from the pity of D'Arcy MacMahon with the consent of Ella MacMahon.

The agreement itself recites the present trifling value of the plaintiff's interest and her poverty, and then proceeds to appropriate one-half of any sum which may be recovered by the means, whatever they were, that the defendant had in view to bring

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about such a result. And as a concession, so it is said, to the plaintiff, who thought 50 per cent. too much, if D'Arcy MacMahon died, the defendant consented to reduce the percentage to one-fourth instead of one-half in that case. Not much of a concession when one remembers that the one-half was to be of what was obtained from D'Arcy MacMahon living, which would probably be nothing, and certainly not much; whereas upon his death the whole became the plaintiff's—the defendant's services were wholly unnecessary—and yet he was to take one-fourth of the whole. This absurd and grossly unfair result is to me the strongest evidence that the plaintiff, however intelligent and capable, did not really understand what she was doing. It was one thing to agree to pay and to pay well for extracting if possible something out of nothing, for that was the real position, and a wholly different thing to agree to pay some \$7,500 to the defendant for nothing at all, for if the estate came to the plaintiff, as it did, by D'Arcy MacMahon's death, the defendant could render her, in such circumstances, no useful services in recovering the estate in Ontario. The plaintiff cannot have understood that she was agreeing to anything so improvident and unreasonable.

Without pursuing the subject further, my opinion is that the appeal should be dismissed with costs.

Appeal dismissed with costs.

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Water—Frozen Surface of Bay of Quinté—Public Highway—Right of Travel Paramount to Right of Ice-cutters—Hole Cut in Ice and Insufficiently Guarded—Nuisance—Criminal Code, sec. 287—Runaway Horse Falling into Hole—Liability of Ice-cutters—Findings of Jury—Evidence—Negligence—Contributory Negligence.

The defendants cut ice in the Bay of Quinté and left a hole in the ice, insufficiently guarded, into which the plaintiff's horse fell and was lost. The horse was being driven by the plaintiff across the bay upon the ice, but had run away, got beyond the plaintiff's control, and departed from the travelled way upon the ice, where he would have been safe:—

Held, per MEREDITH, C.J.O., and CLUTE, J., that it was the duty of the defendants, both at common law and under the provisions of the Criminal Code, sec. 287, to guard the hole that had been made.
Pennock v. Mitchell (1908), 17 O.L.R. 286, approved.

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While the purpose of sec. 287 is the safeguarding of human life, a hole, left unguarded in contravention of that section, in a public highway, as the bay is, is a nuisance; and the plaintiff, having suffered damage different in kind from that which was suffered by the public at large, was entitled to maintain an action therefor.

Review of the authorities on the question of liability in the case of runaway horses.

The true rule is that laid down in *Sherwood v. City of Hamilton* (1875), 37 U.C.R. 410; and *Bell Telephone Co. v. City of Chatham* (1900), 31 S.C.R. 61, does not stand in the way of the *Sherwood* case being applied in a case against a municipal corporation where the highway is out of repair owing to the corporation's neglect to keep it in repair; but, if the rule be otherwise, and the corporation is not liable where horses are running away, that would not help the defendants.

The Bay of Quinté—the whole bay—is a highway and open to the public, and upon its waters when frozen any person may travel on foot or driving an animal. The public have the right to cut the ice, but this right is subordinate to the right of travel, as is shewn by sec. 287; and there was no ground upon which the defendants could escape liability if the hole was not guarded as sec. 287 requires, and the absence of the guard was the cause of the horse being lost, notwithstanding that the horse had escaped from control and was running away when he met his death, if that was not due to the negligence of the plaintiff. Upon the evidence, the hole was not guarded as sec. 287 requires, and the jury found for the plaintiff upon a charge which was not open to objection on the part of the defendants. The question of contributory negligence was also fairly left to the jury, and their verdict acquitted the plaintiff of it, and there was evidence which warranted their finding.

Per HODGINS, J.A.:—The act of the defendants created a nuisance. The liability of one who maintains an excavation on an area adjacent to the highway arises independently of negligence and is an absolute obligation. The occupier has to maintain a fence or other protection for those using the highway; and the duty of the defendants in relation to the hole in this highway was at least as great. It was not necessary to express an opinion upon the other points mentioned above.

Per CURRIE, J.A.:—The plaintiff was entitled to recover damages from the defendants for the loss of his horse.

Judgment of the County Court of the County of Hastings affirmed.

APPEAL by the defendants from the judgment of the Senior Judge of the County Court of the County of Hastings in favour of the plaintiff, upon the findings of a jury, at the trial of an action in that Court, brought to recover damages for the loss of the plaintiff's horse.

The Bay of Quinté being frozen over, the defendants were taking ice from it for the purpose of their business. They left an unguarded or insufficiently guarded hole in the ice, and the plaintiff's horse, which was attached to a sleigh and being driven by the plaintiff over the frozen surface of the bay, ran away, escaped from the beaten track used by travellers upon the ice, got into the hole left by the defendants, and so was lost.

November 11. The appeal was heard by MEREDITH, C.J.O., MACLAREN and HODGINS, J.J.A., and CLUTE, J.

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W. B. Northrup, K.C., for the appellants. The hole in the ice was too far away from the travelled road to constitute a nuisance. The remedy is not by action, but by indictment under sec. 287 of the Criminal Code: *Tompkins v. Brockville Rink Co.* (1899), 31 O.R. 124; Gould on Waters, 2nd ed., para. 111; Gould on Waters, 3rd ed., para. 191. The jury were misdirected as to the effect of sec. 287. The proximate cause of the drowning of the horse was his running away, and under those circumstances the appellants cannot be held liable: *Plouffe v. Canada Iron Furnace Co. Limited* (1905), 10 O.L.R. 37. The hole did not constitute a nuisance: *McDonald v. Lake Simcoe Ice and Cold Storage Co.* (1898-9), 29 O.R. 247, 26 A.R. 411; *S.C. sub nom. Lake Simcoe Ice and Cold Storage Co. v. McDonald* (1901), 31 S.C.R. 130; Farnham on Waters and Water Rights, pp. 651, 653. The right of the appellants to cut ice where they did was paramount to the right of the public to travel on the ice: *Woodman v. Pitman* (1887), 79 Maine 456. The evidence shews that the plaintiff was guilty of contributory negligence.

E. G. Porter, K.C., for the plaintiff, respondent. The hole in the ice, insufficiently guarded as it was, constituted a nuisance which was the cause of the loss of the horse: *Pennock v. Mitchell* (1908), 17 O.L.R. 286; *Toms v. Township of Whitby*, (1874-5), 35 U.C.R. 195, 37 U.C.R. 100. The appellants contravened sec. 287 of the Criminal Code in not protecting the hole as the section required, and this want of protection caused the loss of the horse. The fact of the horse running away does not relieve the appellants of liability, when the running away was not the fault of the respondent: *Sherwood v. City of Hamilton* (1875), 37 U.C.R. 410. The right to cut ice on a navigable river is not paramount to the right of the public to travel on the ice.

Northrup, in reply.

December 21. MEREDITH, C.J.O.:—This is an appeal by the defendants from the judgment dated the 9th June, 1914, of the County Court of the County of Hastings, which was directed to be entered by the Senior Judge of that Court, on the verdict of the jury at the trial before him on that day.

The female appellant conducts an ice business, which is man-

aged by her son, the other appellant, and for the purpose of the business cut ice in the Bay of Quinté.

There is a conflict of testimony as to the area of the opening made in the process of cutting, but it was at least 150 feet long and 8 or 9 feet wide, and the appellants failed to provide the protection around it required by sec. 287 of the Criminal Code, R.S.C. 1906, ch. 146. A horse of the respondent, which was being driven by him, attached to a sleigh in which the respondent and a man named McConnell sat, and in which there were a number of empty milk cans, ran away, and in the course of his flight broke through the thin ice which had formed over the hole, and was drowned. The bay when frozen over is used as a means of travelling from Belleville to the county of Prince Edward, and the respondent was driving across the bay for the purpose of getting a supply of milk from farmers in that county. There was a beaten track which was used in crossing the bay, and the respondent was driving on it when his horse ran away and ultimately came to the hole in the ice, which was distant about 150 feet from the travelled way.

The respondent brings his action to recover damages for the loss of his horse, and claims to recover on two grounds: (1) that the hole in the ice, insufficiently guarded as it was, constituted a nuisance in the highway which he was lawfully using, and that the loss of the horse was due to the existence of the nuisance; (2) that the appellants were guilty of a contravention of sec. 287 in not protecting the hole as that section requires, and that the loss of the horse was due to the failure so to protect it.

The contention of the appellants is, that the hole in the ice did not constitute a nuisance, because of its distance from the travelled way; that no action lies for the failure to provide the protection which sec. 287 requires; and that the proximate cause of the drowning of the horse was his running away and being no longer under the control of his driver, or of any one else; and the appellants also contended that the learned County Court Judge misdirected the jury as to the effect of sec. 287, and that the running away of the horse was occasioned by the negligence of the respondent, who, it was contended, was under the influence of

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liquor and unfit to drive the horse, in driving while in that condition a horse which had run away on the previous day.

The question of contributory negligence was fairly left to the jury, and their verdict acquits the respondent of it, and there was evidence which warrants the jury's finding.

The main question is as to the liability of the appellants for injury done to a runaway horse.

That it was the duty of the appellants, both at common law and under the provisions of the Code, to guard the hole that had been made, is, I think, undoubted, and that such a duty exists was decided by a Divisional Court in *Pennock v. Mitchell*, 17 O.L.R. 286.

It may be that sec. 287 imposes a greater duty as to the nature of the guard than is imposed by the common law, but it is unnecessary, in the view I take, to consider that question.

Section 287 provides that

"Every one is guilty of an offence and liable, on summary conviction, to a fine or imprisonment with or without hard labour, or both, who,—

"(a) cuts or makes, or causes to be cut or made, any hole, opening, aperture or place, of sufficient size or area to endanger human life, through the ice on any navigable or other water open to or frequented by the public, and leaves such hole, opening, aperture or place, while it is in a state dangerous to human life, whether the same is frozen over or not, uninclosed by bushes or trees or unguarded by a guard or fence, of sufficient height and strength to prevent any person from accidentally riding, driving, walking, skating or falling therein."

While the purpose of this enactment was the safeguarding of human life, I have no doubt that a hole, opening, aperture or place, left unguarded in contravention of it, in a public highway, as the Bay of Quinté is, is a nuisance; and, if it be a nuisance, the respondent, having suffered damage different in kind from that which was suffered by the public at large, is entitled to maintain an action for the recovery of the damages which he has sustained.

There is more difficulty as to the liability of the appellants in the circumstances of the case, the horse having run away with-

out, as the jury have found, any negligence on the part of the respondent, and in his flight having broken through the thin ice which had formed over the hole cut by the appellants.

The question as to liability in case of runaway horses is discussed in Elliott on Roads, 3rd ed., vol. 2, pp. 194-5, para. 793, where the result of the American cases is thus stated: "Where a horse takes fright at some object for which the municipality is not responsible, and get beyond the control of his driver and runs away and comes in contact with some obstacle or defect in the road or street, it is held by the highest courts of Maine, Massachusetts, Wisconsin, and perhaps one or two other States, that the municipality will not be liable. These cases are based upon the theory that the conduct of the horse is the primary cause of the accident; that there are two efficient, independent, proximate causes, the primary cause being one for which the corporation is not responsible, and as to which the traveller himself is not in fault, and the other being the defect in the highway; that such being the case, it is impossible to say that the accident would have happened without the primary cause, and the city cannot, therefore, be held liable. According to the weight of authority, however, the city is liable in such a case, where it has been negligent in not removing the obstruction or repairing the defect, provided the injury would not have been sustained but for such obstruction or defect."

The question has been under consideration in this Province in several cases, most of which were cases against municipal corporations, in which they were sought to be made liable because of defects in highways which it was their duty to keep in repair, and in such cases the question is complicated by the further question as to the extent of the duty to repair, e.g., whether in the case of an embankment it is necessary that the guard shall be strong enough to resist the coming into contact with it of a runaway horse.

In *Toms v. Township of Whitby*, 35 U.C.R. 195, 37 U.C.R. 100, the action was for a breach of the statutory duty of the defendants to keep in repair a highway, the defect being the absence of a guard or railing along an embankment leading to a bridge on the highway. The female plaintiff and her son were

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crossing the bridge, when the horse she was driving shied at some new planks on the bridge, and backed to the end of it, when the hind wheel went over the embankment, throwing her out and into the water 14 feet below. The jury found that the road was not in a sufficiently safe state for persons driving along the road, and that the driver of the horse (the female plaintiff) was guilty of no negligence in the management of it. A rule was obtained, pursuant to leave reserved at the trial, to enter a nonsuit, on, amongst other grounds, the following: (1) that the alleged negligence of the defendants was not the proximate cause of damage; and (2) that there was no obligation to keep the highway safe for affrighted or runaway horses; and, after argument, the rule was discharged. After an elaborate review of the authorities, Wilson, J., came to the conclusion that the dangerous condition of the road was the proximate cause of the injury, and that, although the fright of the horse and its becoming unmanageable concurred in part to the accident, they were not "the cause of it in law:" 35 U.C.R. at p. 210. Richards, C.J., was of opinion that "the mere fact that the horse was restive and broke the waggon, or was for the time being not under the control of the driver," could not relieve the defendants from their responsibility: *ib.*, p. 226. Morrison, J., did not dissent, although he said that it seemed to him that it was to the horse becoming unmanageable, and being beyond the control of the driver, that the accident was attributable, and guarded himself from "deciding that if a horse becoming restive or unmanageable runs or backs into a ditch or down a declivity or embankment on a highway, the municipality is therefore accountable for the consequences, or that they are bound to fence or guard all such places against the possibility of a vicious, baulky, or runaway horse, running or backing over the highway at such points:" *ib.*, pp. 227-8.

On appeal to the Court of Error and Appeal this decision was affirmed. Draper, C.J., expressed the opinion that the "horse backing was a casualty not attributable to want of reasonable care and skill in driving, and would not have resulted in any injurious result if the embankment had been properly fenced," but said that "in upholding the right of the plaintiffs to recover upon the facts proved" he was "not giving any sup-

port to the doctrine" which Morrison, J., desired to guard himself from encouraging: 37 U.C.R. at p. 105. Burton, J., found it unnecessary to decide whether if from no fault or negligence of the defendants the horse had taken fright and become unmanageable, and, whilst so beyond the control of the driver, had come upon a defect in the highway by which an injury had been occasioned, the defendants would not have been liable, and pointed out that that was not the case under consideration; that a horse is not to be considered uncontrollable in that sense, if he merely shies or starts, or is momentarily not controlled by his driver: *ib.*, p. 107. Patterson, J., with whom Strong, J., agreed, treated the case on the facts as a case where the plaintiffs were making the ordinary use of the highway, when their horse, without any negligence on their part, shied, and backed, and by reason of the want of repair of the highway the wheels went over the bank (p. 116), and he pointed out (p. 115) that there was nothing "in the evidence to make it necessary to find that the horse was ungovernable, in the sense in which that word is usually applied," and that "the jury were not asked to find if, at the time of the accident, the plaintiffs were making the ordinary use of the road."

In *Price v. Cataraqui Bridge Co.* (1874), 35 U.C.R. 314, the facts were that the defendants, who were incorporated to build a bridge over a river and authorised to take tolls and to let and farm the tolls, leased the tolls, their lessee covenanting to open and close the drawbridge and to cause it to be properly attended to, and the plaintiff's horses, while going down a hill, ran away and threw out the driver, and then ran on to the bridge. The draw had just been opened to let a vessel pass, and—there being no bar or gate to close the bridge—the horses went over the opening into the water and were drowned. There had been gates there to close the bridge while the draw was open, but they had been broken about two months previously, and the new gates which had been made were not up. The jury found: (1) that, if there had been reasonable gates on the bridge at the time of the accident, the accident would have been avoided; (2) that gates strong enough to prevent the accident would not seriously have injured the horses; (3) that the driver was not neg-

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ligent in driving, from drunkenness or from any other cause; and (4) that as a matter of precaution it was reasonable that the company should provide and keep up sufficient gates to stop horses that were running away. And upon these findings the trial Judge directed that judgment should be entered for the plaintiff for the sum at which the damages had been assessed. This judgment was reversed, all the Judges agreeing that, if any one was liable, it was the lessee, and not the defendant. Wilson, J., expressed the opinion that, if the lessee had been the defendant, the plaintiff would have been entitled to succeed: p. 326. Richards, C.J., with whom Morrison, J., agreed, suggested that under the circumstances of the case an action would not lie, even if the defendants had been in occupation of the bridge and liable for any negligence or want of care on the part of themselves or of their servants, because, as he thought, the defendants "would well discharge their duty to the public if they had persons stationed on the bridge to give notice by signals or otherwise when the draw was open," and that they were not bound "to have gates there to stop passengers, and certainly not to stop horses that had run away and were without any control when they came upon their bridge:" p. 327.

In *Sherwood v. City of Hamilton*, 37 U.C.R. 410, the facts were that the plaintiff with a waggon and a load of bricks was coming down a hill on a road by the side of a precipice. He had stopped to speak to some one, when on starting again the horses ran away, and, when they came to an opening in the fence or railing on the road near the foot of the hill, they bolted through it and down the precipice. It was contended by the defendants that the running away of the horses, and not the defective condition of the road, was the proximate cause of the accident, and that the plaintiff was therefore not entitled to recover, and it was so held by Strong, J., at the trial, and the plaintiff was nonsuited. The nonsuit was, however, set aside by the Court of Queen's Bench *en banc*, and the Court held that the mere fact of the horses running away and becoming unmanageable would not prevent the plaintiff from recovering unless he had been guilty of want of reasonable care or skill; adopting the rule in New Hampshire that "where two causes combine to produce the injury,

both in their nature proximate, the one being the defect in the highway and the other some occurrence for which neither party is responsible, the corporation is liable provided the injury would not have been sustained but for the defect in the highway." The judgment of the Court was delivered by Harrison, C.J., and Wilson and Morrison, JJ., concurred with his opinion.

The Court of Appeal had the question under consideration in *Steinhoff v. Corporation of Kent* (1887), 14 A.R. 12. The facts of that case were that the defendants had constructed a bridge across a navigable stream, having in it a draw or swing to enable vessels to ply on the river. There was not any gate or other protection to guard the approaches to the bridge when swung. A horse belonging to the plaintiff broke away from the person in charge of him, escaped out upon the public road, and ran a distance of about two miles to the bridge, reaching it when the draw was open to allow a vessel to pass, and, rushing into the gap, was drowned. The Judge of the County Court had held: (1) that the plaintiff was guilty of contributory negligence in allowing his horse to run away, that the proximate cause of the accident was the runaway; and (2) that the defendants were not guilty of negligence, as "they were only bound to provide against the ordinary contingencies of travel, and not against such circumstances as existed here." Hagarty, C.J.O., in stating his opinion, said that he hardly took the same view as the learned Judge as to the proximate cause of the injury, but thought that on the second ground on which he decided against the plaintiff he took the right view of the evidence. Burton and Patterson, JJ.A., concurred; and Osler, J.A., appears to have been of opinion that the plaintiff could not complain of the absence of a guard, "because at the time of the accident he was not making use of the road in the ordinary way, and that the defendants were only bound 'to provide against the ordinary contingencies of travel,' within which the running away of the horse, under the particular circumstances proved, did not come:" p. 18.

In *Foley v. Township of East Flamborough* (1898), 29 O.R. 139, 141, Armour, C.J., said that he did not think that "the road in order to meet the requirement of the law must be kept in such

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a state of repair as to guard against injury caused by runaway horses," by "runaway horses" meaning "horses whose riders or drivers have entirely lost control of them, and whether such control has been lost in spite of ordinary care or by reason of the want of it."

In the same case (1899), 26 A.R. 43, 45, Osler, J.A., said that he did not regard the fact that the horses were running away at the time of the accident as by any means a conclusive answer to the plaintiffs' right to recover, that the driver was still endeavouring to control them, and both he and the deceased were travellers on the highway. The learned Justice also expressed the opinion that *Sherwood v. City of Hamilton* was a well-decided case, and that it, as well as *Toms v. Township of Whitby*, supported his conclusion; and he pointed out that the cases of *Steinhoff v. Corporation of Kent* and *Price v. Cataragui Bridge Co.* were quite inapposite, adding: "Under such circumstances" (i.e., the circumstances of those cases) "the road cannot be said to be used for the purpose of travel."

In *Atkinson v. City of Chatham* (1898), 29 O.R. 518, the injury resulted from runaway horses attached to a sleigh having escaped the control of their driver and having brought the sleigh into contact with a telephone pole in the highway, but not on the travelled part of it. The trial Judge, Ferguson, J., found that the road, by reason of the pole, was not in a reasonable state of repair, and held that the injury would not have been sustained but for the obstruction caused by the pole, although it was not possible to say what would have been the outcome of the runaway or what other injuries, if any, might have been sustained if the pole were not there. This decision was affirmed by the Court of Appeal as to the liability of the corporation, but reversed as to the third party, the Bell Telephone Company, as against whom the claim of the corporation for indemnity had been allowed: (1899) 26 A.R. 521. The only reference to the running away of the horses that I find in the report of the case is what is said by Moss, J.A., on p. 529, and there is no suggestion there that, assuming, as the learned Judge thought was established, that there was no want of care or skill on the part of the driver of the horses, there was any question as to the defective

condition of the highway not having been the proximate cause of the injury; and, indeed, that it was the proximate cause, seemed to have been assumed to be not open to question.

On appeal to the Supreme Court of Canada, *sub nom. Bell Telephone Co. v. City of Chatham* (1900), 31 S.C.R. 61, the judgment against the corporation was reversed, and it was ordered that the action be dismissed, and that the corporation should pay the costs of the Bell Telephone Company. In delivering the judgment of the Court, Gwynne, J., said that "the *causa causans*" (of the accident) "was the violent, uncontrollable speed at which the horses were running away. Without saying that in no case can a person injured in a carriage drawn by running-away horses maintain an action for damages, we hold that in the present case the sole conclusion justified by the evidence is that the uncontrollable manner in which the horses were running away was the cause of the accident:" p. 65. These observations were not necessary for the decision, for it was held by the Court that the pole was lawfully placed where it was, and was not a nuisance of which persons lawfully using the highway could complain. None of the cases which I have mentioned was referred to by the learned Judge; and, in my opinion, the case cannot properly be treated as overruling the *Sherwood* case.

The latest reported case dealing with the question that I have been able to find is *Thomas v. Township of North Norwich* (1905), 9 O.L.R. 666. In that case a Divisional Court, speaking by the Chancellor, treated the established rule to be that adopted in the *Sherwood* case, which he said was in conformity with the decision in *Toms v. Township of Whitby*, that "where two causes combine to produce the injury, both of which are in their nature proximate, the one being a defect in the highway and the other some occurrence for which neither party is responsible, then the corporation is liable, provided the injury would not have been sustained but for the defect in the highway." The Chancellor also pointed out that the great weight of American decision is in favour of this rule, which he refers to as the "Ontario rule," in the case of concurring causes of injury; referring to Jones on Liability of Municipal Corporations for Tort, ed. of 1901, pp. 171-175.

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The cases are certainly not satisfactory, and are not easily reconcilable, but I am of opinion that the true rule is that laid down in the *Sherwood* case, and that the *Atkinson* case does not stand in the way of its being applied in a case against a municipal corporation where the highway is out of repair owing to the corporation's neglect of the statutory duty to keep it in repair; but, if the rule be otherwise, and the corporation is not liable where horses are running away, that would not, in my opinion, help the appellants. The Bay of Quinté—the whole bay—is a highway and open to the public, and upon its waters when frozen any person may travel on foot or driving his horse or other animal. The public have the right to cut the ice, but this right is subordinate to the right of travel, as is clearly shewn by the provision of the Code to which I have referred; and I am unable to find any ground upon which the appellants can escape liability if the hole which they had made in the ice was not guarded as the Code requires, and the absence of the guard was the cause of the respondent's horse being drowned, notwithstanding that the horse had escaped from the control of his driver and was running away when he met his death, if that was not due to the negligence of the respondent.

That the hole was not guarded as the Code requires is clear upon the evidence, and the danger of the horse getting into it was increased owing to the fact that ice had formed over the hole, but not of sufficient strength to support the weight of the horse. It is possible that, if there had been open water where the ice had been cut, the bushes that had been set up would have been sufficient to have prevented the horse from proceeding beyond them; but, as it was, there was nothing to indicate to the horse that what lay beyond the bushes was not ice like that over which he had been travelling.

The charge to the jury is not, I think, open to the objection taken to it by the appellants' counsel. It was left to the jury to say whether or not the hole was reasonably guarded, but it was pointed out to the jury that it was necessary to guard only so as to keep persons from accidentally driving or falling into it; and that, even if there had been a good, solid fence, three feet high around the hole, it did not follow that it would have kept

the horse from getting into the hole; and, reading the charge as a whole, I do not think that the appellants have any reason to complain that it was too favourable to the respondent.

It was argued for the appellants that the right to cut ice formed in a navigable water is paramount to the right of the public to travel upon the ice, and in support of that contention a decision of the Supreme Judicial Court of Maine, *Woodman v. Pitman*, 79 Maine 456, and also the opinions of American text-writers were cited. Whatever may be the view of American Courts as to the respective rights and duties of the ice-cutter and the public, the policy of our law, as indicated by the provisions of sec. 287 of the Code, is that the safety of human life and limb is paramount to the right of the ice-cutter; and that, if he chooses to exercise his right, he must do so in such a way as not to endanger that safety, by providing the safeguards which by the section he is required to put around the opening which he has made.

I may point out, however, that, while taking the very favourable view which was adopted by the Maine Court of the ice-cutter's rights, it is said (p. 465): "At the same time the appropriators should by suitable means reasonably guard their fields against exposing to danger persons who may be likely to innocently intrude upon them, if such likelihood may be seen to exist."

Upon the whole, I am of opinion that the appeal fails and should be dismissed with costs.

MACLAREN, J.A., agreed in the result.

CLUTE, J., agreed in the opinion of MEREDITH, C.J.O.

HODGINS, J.A.:—In the view I take of this case, it is not necessary to express an opinion on whether the liability of a person cutting a hole in ice towards the owner of a runaway horse is to be measured by the duty required of municipalities or by the care insisted on in regard to those for whose protection sec. 287 of the Criminal Code was enacted (*Gorris v. Scott* (1874), L.R. 9 Ex. 125).

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But I think the act of the appellants was to create a nuisance. The liability of one who maintains an excavation on an area adjacent to the highway is said by Beven, 3rd ed., p. 360, to arise independently of negligence and to be an absolute obligation: "The excavation unprotected is unlawful, a nuisance and indictable. The occupier has to maintain a fence or other protection for those using the highway. His duty is 'to prevent its becoming defective,' and he is subject 'to all risks of injury that may be done to it by strangers or trespassers.' "

The duty of the appellants in relation to the hole in this highway is at least as great.

On this point reference may be made to the cases of *Blithe v. Topham* (1608), 1 Vin. Abr. 554, pl. 4; *Deane v. Clayton* (1817), 7 Taunt. 490, at p. 532; and to the argument and judgment (the Court being divided) in *Barnes v. Ward* (1850), 9 C.B. 392.

I agree that the appeal should be dismissed.

Appeal dismissed with costs.

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Principal and Agent—Agent's Commission on Sale of Land—Written Agreement—Fixed Price and Time for Selling—Subsequent Departure from Agreement—Evidence—General Employment—Introduction of Purchaser—Refusal of Principal to Accept Price Offered—Subsequent Acceptance and Sale by Principal without Intervention of Agent—Rate of Commission—Damages—Arrangement to Divide Commission with Purchaser's Agent—Effect of.

The defendant, the owner of land and a building thereon, on the 20th August, 1913, signed a writing addressed to the plaintiff, in which the property was described and it was said, "I beg herewith to give you an option for thirty days on this property . . . 59½ feet, at \$1,300 per foot, and \$30,000 for the building," i.e., \$107,350, stating the terms of payment. The plaintiff was a real estate agent or broker, and he made an arrangement with the defendant for a commission of 5 per cent., afterwards reduced to \$5,000, if he sold the property. The plaintiff found a purchaser who was willing to give \$100,000; but the defendant, when the plaintiff endeavoured to induce him to accept that price, less a commission, said that he would not take less than \$100,000 net. The defendant afterwards, within the thirty days, sold the property for \$100,000 to the purchaser introduced by the plaintiff, dealing directly with the purchaser:—

Held (MEREDITH, C.J.O., dissenting), that the fair result of the evidence was that, while the option named a price and time for sale, it was understood that, if the plaintiff could effect a sale at a less price, the plaintiff might accept it, and if more time were needed he would give it; that the plaintiff had a general authority; that what happened during the negotiations (set forth in the judgments) did not affect the right of the plaintiff to get a commission on the sale afterwards made; and that, the defendant having himself made the sale to the purchaser introduced by the plaintiff, the plaintiff was entitled to a commission of 5 per cent. (the rate originally fixed) upon the sale-price, or to damages, the measure of which might well be the stated percentage applied to the reduced amount.

Toulmin v. Millar (1887), 58 L.T.R. 96, and *Burchell v. Gowrie and Blockhouse Collieries Limited*, [1910] A.C. 614, applied.

Held, also, that the plaintiff had not forfeited his right to a commission by an arrangement made by him to divide it with the agent of the purchaser. The reason of the rule which prevents an agent from succeeding unless his action is free from the taint of dishonesty is, that he cannot give true service unless he is free from an actual or possible contrary interest; and that rule does not apply to a case where the sale has not actually been made as the result of the agent's negotiation, of which the arrangement with the purchaser's agent was a part.

Andrews v. Ramsay, [1903] 2 K.B. 635, distinguished.

Hippisley v. Knee Brothers, [1905] 1 K.B. 1, and *Nitedals Taendstikfabrik v. Bruster*, [1906] 2 Ch. 671, applied.

Per MEREDITH, C.J.O.:—Upon the evidence, the plaintiff's employment was a limited one, to find a purchaser at the price of \$107,350 within thirty days. This the plaintiff did not do. The claim for the agreed commission, therefore, failed; and there was no ground upon which a claim for a different rate of remuneration could be supported. The proper conclusion upon the evidence was, that \$100,000 was the utmost that the purchaser would give for the property; and, as there was no suggestion of any other buyer, the plaintiff lost nothing by the action of the defendant in making a bargain with the purchaser before the expiry of the thirty days; and the plaintiff could not succeed upon his alternative claim for damages for having been thus prevented from earning his commission.

Judgment of FALCONBRIDGE, C.J.K.B., reversed; MEREDITH, C.J.O., dissenting.

ACTION to recover \$5,000 which the plaintiff claimed as his commission on the sale by the defendant to the Bank of Hamilton of a property in Port Arthur.

June 11. The action was tried before FALCONBRIDGE, C.J. K.B., without a jury, at London.

G. Lynch-Staunton, K.C., and *E. W. Scatcherd*, for the plaintiff.

Sir George Gibbons, K.C., and *G. S. Gibbons*, for the defendant.

August 14. FALCONBRIDGE, C.J.K.B.:—There is very little dispute about the facts. In any conflict which could not be settled by reference to a writing, the plaintiff would fail to satisfy the burthen of proof.

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In his telegram, the defendant declared positively that he would not take less than \$100,000 net to him, and that he would not pay any commission on that figure; and to order the payment of a commission to the plaintiff would be to place it in the power of an agent to dictate to his employer at what price the latter should sell.

Here, as in *Hubbard v. Gage* (1913), 4 O.W.N. 901, the transaction was in the form of an option.

In *Toulmin v. Millar* (1887), 58 L.T.R. 96, a case strongly relied on by the plaintiff, Lord Watson says (p. 97): "The agent then says, 'I think I can find you a purchaser; will you not sell?' To which he replies, 'I will sell for £10,000, not a sixpence less; if you can get that sum, sell; if not, let the property.' I am not prepared to hold that an arrangement expressed in these or in equivalent terms would confer a general employment to sell upon the agent."

This case falls rather within the lines of *Sibbitt v. Carson* (1912), 26 O.L.R. 585: "The mere finding of a purchaser is not enough; there must be a contract to pay; and the terms of the contract, including all limitations as to time, must govern:" *per* Middleton, J., at p. 587; affirmed in appeal (1912), 27 O.L.R. 237; and *Sutherland v. Rhinhart* (1912), 5 Sask. L.R. 343.

I have of course referred also to *Burchell v. Gowrie and Blockhouse Collieries Limited*, [1910] A.C. 614, and *McBrayne v. Imperial Loan Co.* (1913), 28 O.L.R. 653.

The plaintiff fails. The defendant might have afforded to be a little generous. He denies even that he offered the plaintiff \$250 for his expenses. For this and other reasons, in dismissing the action, I make no order as to costs.

The plaintiff appealed from the judgment of FALCONBRIDGE, C.J.K.B.

November 27. The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and HODGINS, JJ.A.

G. Lynch-Staunton, K.C., for the appellant, cited *Toulmin v. Millar*, 58 L.T.R. 96, referring to the two alternative propositions set out by Lord Watson, within the former of which, he

submitted, the case at bar came. The evidence shewed that no fixed price was named, and as a matter of fact the defendant undermined the plaintiff, went behind his back and tampered with his customer in order to deprive him of his commission. The telegrams relied on by the defendant have nothing to do with the case. He relied on *Burchell v. Gowrie and Blockhouse Collieries Limited*, [1910] A.C. 614; *McBrayne v. Imperial Loan Co.* (1913), 28 O.L.R. 653, 658; *Strong v. London Machine Tool Co.* (1913), 4 O.W.N. 593, 1062. He also contended that, if the appellant was not entitled to a commission, he was entitled to damages for the defendant's action in making a bargain with the bank before the expiry of the thirty days, and so preventing the plaintiff from earning a commission.

Sir *George Gibbons*, K.C., and *G. S. Gibbons*, for the defendant, the respondent, argued that the evidence shewed that there was no suggestion by the defendant that he would take less than \$107,000, or that the plaintiff should have any commission if the property were sold for less. They referred to *Kelly v. Enderton*, [1913] A.C. 191. In order that the plaintiff should succeed, the Court must find an agreement to pay a commission on a sale for \$100,000. There is no evidence to support this, and the Court cannot imply such an agreement. The transaction is furthermore a fraudulent one so far as the plaintiff is concerned, as his claim to commission is vitiated by his agreement to divide his commission with the local agent of the bank: *Halsbury's Laws of England*, vol. 1, p. 216, and cases there cited.

Lynch-Staunton, in reply.

December 21. HODGINS, J.A.:—The written agreement between the parties in this case, coupled with the admitted verbal arrangement to pay commission, resembles that considered in *Kelly v. Enderton*, [1913] A.C. 191. The Privy Council found that such a contract amounted to this: an option to buy, coupled with an agreement to allow a commission for finding a purchaser who was able to pay the price, whether the person acquiring the option became the purchaser or gave the benefit of the option to another.

If the option in this case were the only agreement between

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the parties, I should be inclined to think that the appellant could not claim an agency to sell except upon the terms mentioned in the option. But both parties admit that there was mention of some variation in price, and it must be determined whether or not that mention, and the actions of the parties throughout, introduced into the bargain a more general agency.

The arrangement effected with the Bank of Hamilton by the respondent was within the time limited in the option, and of course rendered it impossible for the appellant to negotiate further with the bank, which was known to both parties as the appellant's prospective purchaser. The reservation in the option of the 12th September, 1913, given to the bank's agent, is of course of no consequence in this connection.

It may be taken that the respondent was anxious to sell his property. The option was prepared by him, and in his evidence he states that he did not assume that the appellant was going to buy the property. The evidence as to the price and time is as follows:—

The appellant alleges that, after he got exhibit 1, he told the defendant that "it was going to be a long deal. Q. You told him that? A. And thirty days was not long enough, probably not long enough, and he said, 'Hunt, if you get a real deal on, I will give you all the time necessary to wind it up.' " The appellant then perused the document—"and I told Mr. Emerson, I said, 'Those odd figures will never stick in this deal,' and Mr. Emerson said, 'Do the best you can, I am no cincher.' "

In cross-examination he says that the respondent gave him to understand that he would take less than \$107,350, and told him distinctly to do the best, to see what he could do, and that if he got the right deal he would extend it; he said he would take care of him, and that that meant he would take less than \$107,350. These further questions were put:—

"Q. You had no authority to sell without his consent for less than \$107,350? A. He was the seller.

"Q. You had no authority to sell for less than \$107,350? A. No; I could not sell it unless he accepted it."

The respondent says that, after negotiations were opened with the Bank of Hamilton, the appellant said: "Is this your

rock-bottom price? I said, 'That option is approximately \$107,000, roughly 5 per cent. commission, that would leave something over \$101,000.' I said, 'I might take a little less rather than lose the sale of the property,' but I said, 'I won't consent to it now.' "

On cross-examination he says: "Q. Did you not tell him you would take a little less if that would cause a sale? A. I said I might. Q. If that is going to put the sale through I (you) might be inclined to take a little less? A. Yes. . . . Q. So therefore you had not made up your mind, so far as you expressed it, what your price was? A. No."

The fair result of this, I think, is that, while the option named a price and time for sale, it was understood that, if the appellant could effect a sale at a less price, the respondent might accept it, and if more time were needed he would give it.

In *Toulmin v. Millar*, 58 L.T.R. 96, Lord Watson, in discussing the effect on general authority to sell, of the fixing of a price, thus states the results: "When a proprietor, with the view of selling his estate, goes to an agent and requests him to find a purchaser, naming at the same time the sum which he is willing to accept, that will constitute a general employment; and should the estate be eventually sold to a purchaser introduced by the agent, the latter will be entitled to his commission, although the price paid should be less than the sum named at the time the employment was given. The mention of a specific sum prevents the agent from selling for a lower price without the consent of his employer; but it is given merely as the basis of future negotiations, leaving the actual price to be settled in the course of these negotiations. On the other hand, suppose a proprietor goes to an agent for the purpose of letting and instructs him to let. The agent then says, 'I think I can find you a purchaser; will you not sell?' To which he replies, 'I will sell for £10,000, not a sixpence less; if you can get that sum, sell; if not, let the property.' I am not prepared to hold that an arrangement expressed in these or in equivalent terms would confer a general employment to sell upon the agent. In my opinion it would merely give him a limited mandate to sell for the price specified, instead of letting; and his agency would come to an

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end when he failed to obtain that price, and carried out the alternative scheme of letting the estate to a tenant."

It seems to me that the appellant's position is more properly described by the first part of what I have quoted, and that he had a general authority. Does what happened during the negotiations affect the right of the appellant to get a commission on the sale afterwards made?

The facts in relation thereto are very simple. The option as drawn was given to the agent of the bank, and by him transmitted to the head office. The appellant visited Hamilton and discussed the matter, and the following telegrams passed:—

"Sept. 8th, 1913.

"To J. T. Emerson, Port Arthur, Ont.

"Board met to-day and will send man Port Arthur immediately provided price made one hundred thousand flat. Say will not pay another dollar. Answer quick.

"E. S. HUNT."

"Port Arthur, Ont., Sept. 8th, 1913, 5.53 p.m.

"E. T. Hun (*sic*) Ham.

"Your message received. Will not take less than one hundred thousand net to me. If you do not make deal will you release option. Have another customer.

"J. T. EMERSON."

This telegram is explained by the respondent to refer to a possible customer mentioned by Rankin before the appellant's option was given, whom he had never seen, and with whom there were no negotiations after the appellant went to Hamilton.

"Sept. 9th, 1913.

"To J. T. Emerson, Port Arthur, Ont.

"What commission will you pay on one hundred thousand basis? Board refuse commission. Think you should stretch point. Waiting answer.

"E. S. HUNT."

It was urged in argument that this telegram must be taken as an acknowledgment that the appellant knew that he had no right to a commission, and as a request for a new arrangement. I do not so read it. If the respondent had intimated that he

might take less than \$107,350, then it was reasonable that the appellant, who was to be paid either \$5,000 flat or 5 per cent. on a sale at the stated figure, should express a willingness to negotiate regarding the commission which the respondent would pay under the changed conditions. "Net to me" meant, of course, clear of any commission, and a business man desiring to put the deal through would naturally inquire if the respondent would modify his stand to enable the sale to be closed. It might have been better expressed; and, indeed, the reference to the refusal of the bank to pay commission was not strictly justified, as they had not been asked, and therefore had not refused. But it indicated their attitude so far as it affected the appellant and respondent, and the telegram is just what would be expected if the evidence of the respondent is borne in mind, that he might take a little less if that would cause a sale.

This telegram indicated that the sale to the bank would not go through if the respondent insisted on refusing any commission, or if he did not stretch a point sufficiently to induce the appellant to meet him. Neither party receded, and the appellant wrote to the respondent reproaching him. That letter is lost, but it is set forth on pp. 12, 48, and 65 of the notes of evidence. As detailed by the various parties, it does not, to my mind, indicate the throwing up of the agency, but is confined to a recognition of the fact that the immediate deal with the bank had fallen through, owing to the refusal of any commission.

The view was urged that the telegram of the 9th October, even if not conclusive in itself, throws light on the original agreement, indicating that the appellant realised that a new arrangement was necessary to entitle him to a commission on a less sum than \$107.350. But this leaves out of sight the significance of the evidence I have quoted, which treats the stated price as not being the final basis. Besides this, the respondent's previous telegram shews that he then regarded the appellant as master of the situation till the expiry of the option, and it does not withdraw then and there whatever rights the appellant had arising out of the employment, if, in truth, that was a general one, in the sense I have pointed out.

In the case of *Nightingale v. Parsons*, [1914] 2 K.B. 621, the

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conclusion of Lord Watson in his second proposition in *Toulmin v. Millar* (*ante*) is in fact adopted in dealing with a case in which the alternative of letting had been actually taken. But in that case, the test applied by Collins, M.R., in *Millar v. Radford* (1903), 19 Times L.R. 575, was approved, i.e., "whether the introduction was an efficient cause in bringing about the letting or sale."

The respondent made the sale himself to the Bank of Hamilton for \$100,000 on the 12th September, 1913. This was to the purchaser introduced by the appellant; and, applying the cases of *Burchell v. Gowrie and Blockhouse Collieries Limited*, [1910] A.C. 614, *Stratton v. Vachon* (1911) 44 S.C.R. 395, *McBrayne v. Imperial Loan Co.*, 28 O.L.R. 653, and *Stewart v. Henderson* (1914), 30 O.L.R. 447, I think the appeal should succeed.

In the *Burchell* case it was held that, as the agent had brought the vendors into relation with the actual purchaser, he was entitled to recover, although the vendors had sold behind his back, on terms which he had advised them not to accept.

The evidence as to the amount of the commission was, that it was originally arranged to be 5 per cent., but that the respondent got the appellant to agree to \$5,000. In this case it makes little difference which basis is taken, for 5 per cent. on \$100,000 comes to \$5,000. It seems to follow that, if the original bargain included a general employment, the agent would be entitled either to the agreed commission or to damages, the measure of which might well be the stated percentage applied to the reduced amount: *Burchell v. Gowrie and Blockhouse Collieries Limited*, [1910] A.C. at p. 626. The sum of \$5,000 was fixed with regard to the contemplated price of \$107,350, according to the evidence I have quoted; and, as it was not obtained, the appellant is justified in claiming, on the price actually got, commission at the rate of 5 per cent.

Counsel for the respondent contended that, even if the appellant were otherwise entitled to a commission, he had forfeited his right to it by his arrangement to divide his commission with the local agent of the bank. He urged that, if a sale had been made, the bank, on discovering this fact, could repudiate the transaction; and that an agent who so acted as to produce a contract

which might, at the option of the purchaser, be voided, could not recover commission. In this contention I would be disposed to agree if the sale had been actually made as a result of the agent's negotiation, of which that arrangement was a part. But recovery here depends on a different cause, i.e., the introduction, brought about by the agent, before any other act had been done, of the purchaser with whom the principal, disregarding the agent and intervening himself, made the contract.

It is true that Lord Alverstone in *Andrews v. Ramsay*, [1903] 2 K.B. 635, uses the expression: "A principal is entitled to have an honest agent, and it is only an honest agent who is entitled to any commission;" but I think that decision is correctly interpreted in *Hippisley v. Knee Brothers*, [1905] 1 K.B. 1, and in *Nitedals Taendstikfabrik v. Bruster*, [1906] 2 Ch. 671. In the first case the agent received a secret profit from the purchaser, and the Court held that his interest was therefore adverse to that of his principal, and that in such a case he could not say that he had faithfully performed his duty. It was pointed out that, even if the agent had been impartial, that was not what the principal was entitled to, and that it was impossible to say what might have been the result if the agent had acted honestly. In the *Nitedals* case there were transactions which were conducted honourably, and some that were not; and Neville, J., decided that these were separable. In the *Hippisley* case the same principle was applied, though under different circumstances. This case is, of course, not one exactly of the kind there dealt with, for the right to commission, so far as the appellant is concerned, depends upon his introduction of the purchaser to whom the property was afterwards sold. But I think the distinction may reasonably be made that the intervention of the respondent eliminated from the transaction the negotiation in which the impropriety occurred, and that it is separable from and does not interfere with the right of the appellant depending only upon the introduction prior to the bargain with the agent. The latter disclaims any right, arising from the improper offer, as attaching to the sale actually made, and the respondent insists that his sale had no connection with the appellant. It would be a misapplication of the principle to hold that an act, evid-

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ence of which is in no way essentially connected with nor part of the proof upon which his success depends, should disentitle an agent to receive his commission.

Having regard to the reason of the rule which prevents an agent from succeeding unless his action is free from the taint of dishonesty—which reason I take to be that he cannot give true service unless he is free from an actual or possible contrary interest—I think the appellant is, under the circumstances in evidence here, entitled to be paid.

The appeal should be allowed, and judgment entered for the appellant, with costs throughout, for the sum of \$5,000.

MACLAREN and MAGEE, J.J.A., concurred.

MEREDITH, C.J.O.:—This is an appeal by the plaintiff from the judgment dated the 14th August, 1914, which was directed to be entered by the Chief Justice of the King's Bench, after the trial before him sitting without a jury at London, on the 11th June, 1914.

The action is brought to recover \$5,000 which the appellant claims as his commission on the sale by the respondent to the Bank of Hamilton of a property in Port Arthur.

The circumstances under which the appellant makes his claim to the commission, as set out in the statement of claim, are: that the respondent employed him to sell the property for him; that the respondent "fixed a price or sum at which" the appellant "was to sell the property, amounting to \$107,500;" that the appellant, "after great expense, time, risk, and trouble, secured the Bank of Hamilton as a customer for" the property at the price of \$100,000; that the respondent "subsequently appropriated the time, risk, pains, and trouble in securing the said customer, and sold the premises to the Bank of Hamilton for the sum of \$100,000;" and that the respondent refuses to pay the appellant anything for his services in securing the "customer;" and the appellant claims \$5,000 for commission upon the sale of the property to the Bank of Hamilton.

The respondent by his statement of defence denies these allegations, and says that, if he ever employed the appellant to

sell the property—which he denies—it was on the condition that the appellant should secure a purchaser at \$107,500 before the 19th September, 1913, and that the appellant did not within that time procure a purchaser at that price.

Upon these issues the case went down to trial, and the learned Chief Justice dismissed the action, upon the ground that “the mere finding of a purchaser is not enough; there must be a contract to pay; and the terms of the contract, including all limitations as to time, must govern;” and, as I understand his reasons for judgment, his finding was, that the employment of the appellant and the respondent’s contract with him were, as the respondent alleges, an employment to sell for \$107,500, limited in time to the 19th September, 1913, and a contract to pay commission if a sale were effected, through the agency of the appellant, at that price and within that period.

Upon the argument before us, counsel for the appellant contended that the evidence established a general employment of the appellant to find a purchaser, unlimited as to price, but limited as to time, as the respondent alleges; and that, as the purchaser was introduced by the appellant, he is entitled to his commission, although the sale was ultimately made by the respondent without the intervention of the appellant, and at a less price than that named by the respondent when the employment was entered into; and counsel for the appellant also contended that, if he failed in that contention, the appellant was entitled to damages for having been prevented from earning his commission by the act of the respondent in selling the property within the period which was allowed to the appellant in which to find a purchaser.

The appellant adduced in evidence a writing addressed to him, signed by the respondent and dated the 20th August, 1913 (exhibit 1), which reads as follows: “In reference to the conversation I had with you in connection with the sale of my block, corner Cumberland and Lorne streets, I beg herewith to give you an option for thirty days on this property as follows. The entire property contains 59 ft. 7 inches, 35 ft. 6 inches being occupied . . . and 24 ft. 1 inch being . . . making a total

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of 59 ft. 7 inches, or say $59\frac{1}{2}$ ft., at \$1,300 per foot, and \$30,000 for the building. Terms one-third cash and the balance in one and two years at seven per cent. . . .”

According to the testimony of the appellant, he is a real estate agent, and had been asked by the respondent on several occasions before the 20th August, 1913, to “try and dispose” of this property, and that he had made efforts to find a purchaser for it; that in the spring of 1913 he formed the idea that the Bank of Hamilton might buy it, and had discussed with Mr. Pearce, the manager of the bank, the question of the bank buying it, and that the proposition was favourably received by Mr. Pearce; that he then went to the respondent and told him what he was doing and what had occurred, and that the respondent promised “not to do anything with the proposition” until the appellant had heard further; that subsequently the respondent put the property in his hands and gave him the document exhibit 1; that the day before he got the document he had a conversation with the respondent and told him that it was “going to be a long expensive deal, was going to take a lot of money, and to figure to pay” the appellant a 5 per cent. commission on the sale-price, and that the respondent agreed to do this; that \$107,500 was the price the respondent first put on the property; that the appellant asked the respondent to give him “the letter with the commission separately;” that, when the document was signed, after some discussion as to the commission, it was agreed that the appellant would take “\$5,000 on the price” the respondent got for the property; that the respondent promised to put this in writing, but never did so; and that, when the document was handed to him, in perusing it he noticed \$107,350—which figures, by the way, are not mentioned in the document—and told the respondent “those odd figures would never stick in this deal,” to which the respondent replied: “Do the best you can; I am no cincher.”

The appellant also testified that in October, 1913, having found that the property was sold, he went to the respondent and told him that he sold the property behind the appellant’s back and “took his customer.”

The account of the transaction given by the respondent

differs in some important particulars from the appellant's account of it. He does not in terms deny that he had, before the conversation which led up to the document exhibit 1, asked the appellant to "try and dispose" of the property, but he testified that, as it was first drawn, the document contained a 5 per cent. commission clause, and that, seeing it, the appellant said he did not want it in, and to leave it out; and that, according to the wish of the appellant, he had the document redrawn with that clause omitted. He also testified that nothing was said about his selling at a lower price until some days after the document was given to the appellant, when in the course of a conversation with him the appellant asked, "Is this your rock-bottom price?" and the respondent's answer was, "That option is approximately \$107,000, roughly 5 per cent. commission, that would leave something over \$101,000;" that he might take a little less rather than lose the sale of the property, but that he would not then consent to it. The respondent does not in terms deny that the commission was ultimately fixed at \$5,000, though his testimony as to what occurred is probably inconsistent with that having been agreed to.

As I understand the testimony of the respondent, the effect of his version of the transaction is, that the appellant's employment was to find a purchaser, for the price and within the time mentioned in exhibit 1; and, as I have said, the learned Chief Justice must have found that that was the true nature of the employment.

It is impossible, in my opinion, to reverse that finding, especially in view of the telegrams to which I shall now refer; and, if it stands, the appellant's case, so far as it rests upon the theory that he earned the commission, must fail.

The appellant continued his negotiations with the Bank of Hamilton, and on the 8th September, 1913, sent the following telegram to the respondent: "Board met to-day and will send man Port Arthur immediately provided price made one hundred thousand flat. Say will not pay another dollar. Answer quick."

In reply to this message a telegram was on the same day sent by the respondent to the appellant as follows: "Your message

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received. Will not take less than one hundred thousand net to me. If you do not make deal will you release option. Have another customer."

On the following day a telegram was sent by the appellant to the respondent, which reads as follows: "What commission will you pay on one hundred thousand basis. Board refuse commission. Think you should stretch point. Waiting answer."

And the same day the respondent telegraphed in reply as follows: "Your message ninth received. Will not pay any commission. My offer of ninth expires midnight of eleventh instant."

What offer is referred to in this telegram does not appear, but it is probably the offer contained in the telegram of the 8th. It is plain, I think, from the appellant's telegram of the 9th September, that he knew that, according to his arrangement with the respondent, he was not entitled to a commission of 5 per cent. on the sale-price or a commission of \$5,000, unless he should effect a sale for the price mentioned in exhibit 1, and that his effort was to get the respondent to agree to pay him a commission if a sale should be made at \$100,000; and his conduct after the receipt of the later of these telegrams is consistent only with the view that, having failed to induce the respondent to sell for \$100,000, unless that price was "net," and having failed also to induce the respondent to agree to pay him a commission on a sale for \$100,000, he abandoned all further attempt to sell for a price that would be satisfactory to the respondent.

In the case of a general employment to find a purchaser, in the event of a sale being made to a purchaser introduced by the agent, though at a less price than that named by the principal, the agent is no doubt entitled to the agreed commission, or, if the amount of the commission has not been agreed upon, to be paid as upon a *quantum meruit*; but that was not, in my opinion, the nature of the appellant's employment, which was, I think, a limited one, to find a purchaser at the price of \$107,350 within the time mentioned in exhibit 1.

The fact that, as the appellant testified, his commission was to be a lump sum, seems to me to be more consistent with his

employment being of the limited character I have mentioned than with its having been what the appellant now alleges it was.

The claim for the agreed commission therefore fails, and there is no ground upon which a claim for a different rate of remuneration can be supported. There is no pretence that there ever was any agreement as to the rate of commission but the one which the appellant sets up, and the express agreement necessarily excluded the implication of any other agreement; and I think it is not open to question that the whole bargain between the parties except the arrangement as to the commission was intended to be and was embodied in exhibit 1.

The alternative case made by the appellant, in my opinion, also fails. It is true that on the 12th September, 1913, and before the expiration of the 30 days mentioned in exhibit 1, the respondent gave an option on the property for 5 days, commencing on the 20th September, for \$100,000, to Mr. McGillivray, acting for the Bank of Hamilton, and that the option was taken up and the sale was carried out in accordance with it, but that option was given "subject to the property not being sold under option now existing to one E. S. Hunt, which option expires on the 19th of September."

It may be said that the giving of the option to McGillivray rendered it impossible for the appellant to effect a sale to the Bank of Hamilton at a price which would entitle him to the agreed commission, and that is no doubt the case, but the proper conclusion upon the evidence is, that \$100,000 was the utmost that the bank would give for the property; and, as there was no suggestion of any other buyer, it follows that the appellant lost nothing by the action of the respondent; and it is only if he was damnified by it, and to the extent to which he was damnified, that he would be entitled to recover on this branch of the case.

I would affirm the judgment of the learned Chief Justice and dismiss the appeal with costs.

Appeal allowed; MEREDITH, C.J.O., dissenting.

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Jan. 20.

Feb. 10.

Dec. 24.

Fraud and Misrepresentation—Purchase of Patent for Invention—Contract—Rescission—Damages—Conduct—Election to Affirm or Disaffirm—Evidence—Estoppel—Finding of Trial Judge—Appeal.

The plaintiff alleged and proved fraud and misrepresentation of the defendants whereby he was induced to enter into an agreement for the purchase of a patent for an invention, and was *held*, entitled to have the agreement set aside and to damages made up of the money he had paid and a further sum for loss of time, expense, etc.; and it was also *held* (RIDDELL, J., dissenting), that the plaintiff had not by his conduct elected to affirm the contract, although he withheld from the defendants notice of his intention to disaffirm it, and acted for some time as if he did intend to affirm.

In general a contract induced by misrepresentation is valid until disaffirmed; whether or not there has been an election in fact depends upon the view taken of the evidence; and in this case, having regard to the facts as found by the trial Judge and the credit which he gave to the plaintiff's evidence, it could not be said that the plaintiff had elected to affirm. An estoppel could arise only on proof that the defendants had been prejudicially affected by a belief that the plaintiff was treating the contract as binding.

Morrison v. Universal Marine Insurance Co. (1872-3) L.R. 8 Ex. 40, 197, followed.

Campbell v. Fleming (1834), 1 A. & E. 40, distinguished.

Per RIDDELL, J.:—The plaintiff, by reason of his conduct, was not entitled to repudiate the contract; but that would not prevent his succeeding in an action for deceit.

Judgment of LENNOX, J., affirmed.

ACTION to set aside an agreement of the 5th January, 1912, as having been procured by fraud, and for the return of \$5,000 paid thereunder.

The action was tried by LENNOX, J., without a jury.

R. B. Henderson, for the plaintiff.

H. D. Gamble, K.C., for the defendant Catts.

W. E. Raney, K.C., for the defendant Hill.

January 20. LENNOX, J.:—The defendants conspired to deceive and cheat the plaintiff. For dishonesty this case would rank fairly well with a western land deal. There can be no doubt at all that Hill was Catts' agent for the purpose of "handling" the plaintiff; and this as well after as before the signing of the contract. It is amazing that a man as clever as Mr. Hill

is swears to the contrary. Not only does the defendant Catts say that Hill had the sole management of "the financial end" of the transaction, but Hill himself and his agent Collard establish it. All the papers, contracts, tests, reports, testimonials, drawings, and the like, were in Hill's hands, and he was the person to explain them. On the evidence of Hill, Collard, and Catts, it is shewn that Collard, who was in the same office with Hill, and his agent to sell Porcupine-Hecla stock, was engaged by Hill, at a commission of 5 per cent., to find some one who could be induced to put \$5,000 cash into the Straight Filament Lamp patent. Collard could not interest the plaintiff in mining stock, but, *when he happened to recollect* and mention that there was a man in an office near him—his employer, Mr. Hill, as it turned out—who was putting \$5,000 of his own money into an industrial proposition of some kind, all delightfully vague and remote from any interest of Mr. Collard's, the plaintiff became interested and expressed a disposition to take up a matter of that character if he got in "upon the ground floor." Collard promptly reported, and was thereupon sent back to the plaintiff, when Hill's identity, the general nature of the proposition, as they call it, and Catts' address, were disclosed—but not Mr. Collard's agency of course. The plaintiff called and Catts pointed out the merits of the lamp, but declined, or at all events omitted, to say whether it was true or not that Hill was putting in \$5,000 of his own money, and referred the plaintiff to Mr. Hill for discussion of all money questions. The plaintiff then went over to Hill's office, but before he reached it Hill was advised by telephone from Catts to expect him. From that time on, Hill was the intermediary between the plaintiff and Catts in practically everything that was done.

Hill then, repudiating agency, insists that it was simply that he was helping Catts and Catts was helping him. Well? I am disposed to look at it in this light too. Partners if you like—the name is not important—if they combined to conceal the real terms of the contract from the plaintiff, and they did; and more than this I find that not only was Mr. Hill peculiarly solicitous of the interests of his co-defendant after the contract was entered into, but throughout the whole trial these two men invariably

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played into each other's hands. In this way, with separate counsel, the trial was most unfair to the plaintiff. Helping each other, as the defendants both swear, the question arises, how was Hill to be paid, and how was he paid?

I find that shortly before the execution of the contract, and as an inducement to the plaintiff to enter into it, the defendant Catts, in the presence and hearing of Hill, stated to the plaintiff that he had made a contract with Mr. Hastings, of the Hydro-Electric, to be allowed to install lamps at the corner of King and Yonge streets, in the city of Toronto, as a test, and that the lamps were to be put up within two weeks; and the plaintiff regarded this as a very important concession, and he believed Mr. Catts' statement and was influenced by it. Evidence given by the plaintiff satisfies me that Hill heard this statement, and his subsequent actions would indicate that he did not believe it; but it is not important to reach a conclusion upon this point. The defendant Catts had not the slightest justification for the representation; it was false in every particular; and there could be no mistake about the attitude of Mr. Hastings.

About the 30th January, the plaintiff decided not to have anything to do with the patent; and Mr. Hill, no doubt with an eye upon the future, pretended that if the plaintiff did not go in he would not either. As a matter of fact the plaintiff was the last hope—there could be nothing done without him. The plaintiff was induced to reconsider his decision by Mr. Hill's offer to relieve him of the contract and give him back his money if he became dissatisfied. He does not seem to have realised that this was not quite the same as having the money in his pocket; but he was going in with "a Toronto man," a man with an amazing knowledge of lamps—acquired as the agent of Mr. Catts—a manifestly capable man, who was putting in \$5,000 himself, and willing to take up the other \$5,000 as well. Was he getting in "upon the ground floor," as he had stipulated? In the most explicit and positive way Hill assured the plaintiff that he was actually investing \$5,000 in money, just as the plaintiff was doing. Catts knew that the plaintiff was relying upon this.

I find that the defendants, acting in concert, falsely and fraudulently represented to the plaintiff that in the matter of

this sale Catts was dealing with Hill exactly upon the same terms as he was dealing with the plaintiff, and that Hill was actually and in good faith paying Catts \$5,000 in money just as the plaintiff was paying that sum, and the plaintiff accepted and relied upon these representations, and but for them, although other representations had influence with him, would not have entered into the contract with the defendant Catts.

This is what happened. After this contract was executed, the plaintiff and the defendant Hill each deposited his cheque for \$5,000 with a solicitor to be handed to Catts on the 6th February if everything was found to be all right at Ottawa. On the 6th, Catts got the cheques, and cashed the plaintiff's cheque at the Traders Bank. Hill was in the Traders Bank when Catts was there to get the money—Hill says, for identification only, and for only a part of the time that Catts was there. Catts handed over the \$5,000 he got on the plaintiff's cheque to Hill. Hill took the money to his own bank and deposited it there to meet his own cheque at about 2.45 p.m.—for which he had made no provision until then—and, before 3 o'clock p.m., Catts presented Hill's cheque, got it accepted, and later got it cashed at the King Edward Hotel, and left for New York that night.

The defendants pretend that at this time Hill made a *bonâ fide* sale of Porcupine-Hecla stock to Catts for \$5,000, and that the handing over of the money from Catts to Hill and the immediate repayment of it was not a sham. I have come to a different conclusion. I find, upon evidence of the defendants' witness J. C. Cottrell, and contrary to evidence given by Mr. Catts, that neither Johnston nor Cottrell was in Toronto at that time, or upon the other occasion referred to, or at any time with \$5,000 to pay for this stock, or with any money, or to make any arrangements to pay for this stock, and that neither Cottrell nor Johnston had any knowledge of it. This is only a slight circumstance if the evidence in the main was reasonably satisfactory—but it is not—and if the probabilities were consistent with the defendants' story—but, to my mind, they, very decidedly, are not. It was money, not wild cats, that Mr. Catts was looking for. He tried to sell his patent in Montreal, and failed. Before the plaintiff was approached, three different attempts at syndi-

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eating in Toronto had failed. If the letter of the 29th November, 1911, was written at that time, it shews that Catts wanted \$25,000 or \$30,000 in cash for his patent, *and he was not particular which*, and if he could land this amount of money through the assistance of Hill he would work Hill into the syndicate upon a simultaneous exchange of funds of exactly the same character as took place on the 6th February, 1912. It is manifest that, upon the transaction as then proposed, Catts did not propose to pay one cent for the stock, for he was adding \$5,000 or more to his highest price.

What are the facts as to Porcupine-Hecla stock? The company was not organised, and is not shewn to have been incorporated, when this offer is said to have been made. Not a foot of land had been acquired at that time. A worthless location was conveyed to the company on the 3rd January, 1912. The question of course is not whether this stock is of some value, but was Hill's reiterated statement and Catts' representation that Hill, like Carrique, was paying \$5,000, true or false? On the 4th September, 1912, Mr. Hill, for the purpose of obtaining an injunction in another action, swore that he had personally examined the property of the company, that the president and a Mr. Pope had also examined it, and assays had been made; and that, "after careful investigation, the conclusion of the directors of the company is, that the said mining location shews no indications of value whatever, and is entirely worthless." And yet this defendant, before his affidavit was produced in Court, had the hardihood to swear that for anything he knew a bank might lend up to the face value upon this stock and that the \$5,000 stock was the same as \$5,000 in money. Even when confronted by his own affidavit, he was not at the end of his resources, for, as he says, "You cannot really be sure until the location is developed." Why of course! And who is going to develope this admittedly worthless mine?

But this witness says that sales were made. Of course sales were made, and stocks exchanged for promissory notes equally worthless; but there were no books produced, and the one solitary buyer called, like Mr. Catts, went into the deal without in-

vestigation, and, like Mr. Catts, has never thought of making any investigation since. Sales! Do sales prove anything more than the universally admitted fact that the fools are not all dead? Do sales prove that Mr. Catts really and honestly paid \$5,000 for stock in a mine of which he neither knew, nor tried to learn, anything whatever, or that either of the defendants told the truth when he represented that Hill and the plaintiff were getting into this transaction upon the same terms? The belated letter of the 29th November is not altogether free from suspicion; and, assuming that it is all right, it works against the argument of two entirely independent transactions.

But, in addition to all this, the circumstances at least demand that the contention of the defendants should be supported by thoroughly reliable evidence. I do not mean that the onus is upon the defendants. The witnesses for the defence upon this question are the defendants and Mr. Cottrell. As already stated, Cottrell distinctly contradicts Mr. Coats and weakens the whole basis of this defendant's story. I have indicated that I have no great faith in the testimony of Mr. Hill. As a matter of fact, I have no confidence in the evidence of either of the defendants. Hill is a more adroit witness than Catts, but neither of them appeared to make it a point to tell the truth. Each of them gave various accounts of the alleged sale of stock. Taking the evidence of either of the defendants, it is quite impossible to reconcile his different accounts of what happened, and it is impossible to reconcile the evidence of one with the other. But, aside from this, neither of these men gave his evidence in a way to inspire confidence—in neither case was it the manner of an honest man. I cannot accept the evidence of either of the defendants where it conflicts with other evidence. Neither of these defendants in November, 1911, or January or February, 1912, ever for a moment imagined that the stock in question was worth \$5,000, or any substantial sum of money.

Mr. Hill's cheque was issued and the money passed from defendant to defendant and back again in pursuance of a dishonest scheme of the defendants to deceive and entrap the plaintiff, and to embarrass him and mislead the Courts in case of complaint: and there was no *bonâ fide* sale of stock to Catts as alleged.

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The conclusions above expressed having been come to as to two of the misrepresentations charged, it becomes unnecessary to deal with the others.

The plaintiff has not ratified or confirmed the contract.

Before indicating more specifically what my judgment will be, it will be convenient to refer to the claim made against Hill alone. The document by which Hill agrees to take over the plaintiff's interest in the patent and to secure and pay him \$5,000 with interest was intended to be a sealed instrument, as the concluding words shew, and I accept the plaintiff's evidence that it was sealed at the time of execution and delivery to him; and nothing has taken place to deprive the plaintiff of the right to enforce it according to its terms.

Whether I shall make an order directing this defendant to furnish security, I shall determine when I endorse the record as hereinafter referred to.

There have been several applications for leave to amend. All parties will have leave to amend in conformity with the evidence, and to reply to the amendments, say within two weeks. If difficulties arise, I may be spoken to. I am of opinion that it is better that the plaintiff, instead of pursuing his rights against the defendant Hill under the agreement, should directly claim to recover against the two defendants by reason of the concerted fraud and misrepresentation hereinbefore found—and leave is granted to him to amend accordingly if he desires to do so.

There will be judgment setting aside the contract entered into with the defendant Catts so far as it affects the plaintiff, and against both defendants for the loss the plaintiff has sustained, with costs of the action; but I shall withhold the endorsement of the record until the amendments are made.

February 10. LENNOX, J.:—Pursuant to notice to the defendants, the plaintiff applied on the 4th instant for liberty to amend his statement of claim, and filed the proposed amendment. This amendment is allowed, and amendments asked for by the defendants at the trial may be made if they desire them.

The plaintiff in his amended statement asks judgment, as damages, against the defendants, for a sum equal to the \$5,000 paid and interest thereon, and, in addition, \$1,000 for loss of time, expense, etc.

The plaintiff had to borrow the money, I think, to make this payment; and if he has been discounting promissory notes since that time to keep it going, it has probably cost him \$700 or \$800. I have no doubt but that his loss would in all amount to as much as he claims, but he cannot expect to indulge in wild cat dreams of wealth without being subjected to some loss when the rude awakening comes.

I think I shall be right in assessing the damages at \$6,000; and, as I have already said, with costs. These will include the costs of the commission executed in New York City.

The counterclaim will be dismissed with costs.

Both defendants appealed from the judgment of LENNOX, J.

September 24, 25, and 28. The appeals were heard by MULOCK, C.J., Ex., CLUTE, RIDDELL, and SUTHERLAND, JJ.

H. D. Gamble, K.C., for the appellant Catts, denied that there had been any conspiracy between Catts and Hill to defraud the plaintiff, and also denied that Hill had been an agent of Catts. Nor had Catts made any false representations to the plaintiff to induce him to invest \$5,000 in the patent in question. The plaintiff had entered into the agreement to purchase after a careful investigation of the facts. Catts had entered into the agreement in good faith with Hill and the plaintiff. The plaintiff by his conduct and acquiescence and ratification was estopped from asking for the rescission of the agreement.

W. E. Raney, K.C., for the appellant Hill, also denied any conspiracy between Hill and Catts to defraud the plaintiff. Fraud must be proved clearly and distinctly. A slight preponderance of evidence in the plaintiff's favour is not sufficient: *Smith v. Haines* (1914), 5 O.W.N. 866. Hill had not been the agent of Catts. He had acted all along in good faith, and had made no false representations to the plaintiff to induce him to

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invest in the patent. The plaintiff had made a full investigation of the facts before entering into the contract. The plaintiff by his acquiescence had waived his right to rescind: *Kerr on Fraud and Mistake*, 4th ed., pp. 379, 380, 381; *Campbell v. Fleming* (1834), 1 A. & E. 40; *Webb v. Roberts* (1907), 16 O.L.R. 279, at p. 283.

James H. Carrique, the plaintiff, respondent, in person, said that misrepresentation and fraud had been clearly proved against both defendants, and that the evidence shewed that Hill had been Catts' agent. He contended that it had never been his intention to affirm the contract, and he had never elected to affirm it. His only object in delaying the disaffirmance of it had been to get more evidence in support of annulling it. That had been his reason for speaking to certain other persons about taking stock in the company. He would not have allowed them to join the company.

December 24. CLUTE, J.:—Appeal by the defendants from the judgment of Lennox, J.

The action is brought by the plaintiff to set aside a contract of the 5th January, 1912, as having been obtained by fraud, and for the return of \$5,000 paid thereunder. An amendment was allowed, permitting the plaintiff to claim \$1,000 for loss of time, expenses, etc.

The judgment set aside the contract as fraudulent and void, and damages were assessed to the plaintiff at \$6,000.

There is evidence to support the finding that the contract was obtained by misrepresentation and fraud. The trial Judge did not accept the evidence of the defendants. He saw the witnesses, and it was for him to say what weight he would attach to their evidence.

The real difficulty in the case from the plaintiff's standpoint is that, upon his own evidence, it is quite clear that he did not repudiate the contract after he had become fully aware of the misrepresentation made to him, but on the contrary treated it as still existing for some months, and in his correspondence and

interviews with the defendants allowed them to believe that he regarded the contract as valid. This view of the case does not seem to have been taken, or, if taken, pressed, at the trial.

The trial Judge finds that, shortly before the execution of the contract, and as an inducement to the plaintiff to enter into it, the defendant Catts, in the presence and hearing of Hill, stated to the plaintiff that he had made a contract with Mr. Hastings, of the Hydro-Electric, to install lamps at the corner of King and Yonge streets, in the city of Toronto, as a test, the lamps to be up within two weeks, and the plaintiff regarded this as a very important concession, and he believed Mr. Catts' statement and was influenced by it. He further states that evidence given by the plaintiff satisfied him that Hill heard this statement, and his subsequent actions indicated that he did not believe it; that the defendant Catts had not the slightest justification for this representation, and it was false in every particular. He further finds that the defendants, acting in concert, falsely and fraudulently represented to the plaintiff that in the matter of the sale of the patent Catts was dealing with Hill exactly upon the same terms as he was dealing with the plaintiff, and that Hill was actually and in good faith paying Catts \$5,000 in money just as the plaintiff was paying that sum, and that the plaintiff accepted and relied upon these representations, and, but for them, although other representations had influence with him, would not have entered into the contract with the defendant Catts. He finds that what happened was this. After the contract was executed, the plaintiff and the defendant Hill each deposited his cheque for \$5,000 with a solicitor to be handed to Catts on the 6th February if everything with respect to the patent was found to be all right at Ottawa. On the 6th, Catts got the cheques, and cashed the plaintiff's cheque at the Traders Bank. Hill was in the Traders Bank when Catts was there to get the money—Hill says, for identification only. Catts handed over to Hill the \$5,000 he got on the plaintiff's cheque. Hill took this money to his own bank, and deposited it there to meet his own cheque at about 2.45 p.m., for which he had made no provision until then, and before 3 o'clock p.m. Catts presented Hill's cheque, got it accepted, and later got it

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cashed at the King Edward Hotel, and left for New York that night. The defendants pretend that at this time Hill made a *bonâ fide* sale of Porcupine-Hecla stock to Catts for \$5,000, and that the handing over of the money from Catts to Hill and the immediate repayment of it was not a sham. The trial Judge comes to a different conclusion, and finds, upon the evidence of the defendants' witness J. C. Cottrell, and contrary to the evidence given by Catts, that neither Johnston nor Cottrell was in Toronto at that time, or upon the other occasion referred to, or at any time with \$5,000 to pay for this stock, or with any money or to make any arrangement to pay for this stock, and that neither Cottrell nor Johnston had any knowledge of it. He further points out with regard to the Porcupine-Hecla stock that the company was not organised and is not shewn to have been incorporated, and when this sale is said to have been made not a foot of land had been acquired; a worthless location was conveyed to the company afterwards. After further dealing with the transaction, and not accepting the evidence of the defendants where it conflicts with other evidence, he finds that neither of the defendants considered that the stock was worth \$5,000 or any substantial sum of money, and that Mr. Hill's cheque was issued, and that money passed from one to the other and back again, in pursuance of a dishonest scheme of the defendants to deceive and entrap the plaintiff, and to embarrass him and mislead the Courts in case of complaint, and there was no *bonâ fide* sale of stock to Catts as alleged. He further finds that the plaintiff has not ratified or affirmed the contract.

Having regard to the view taken of the evidence by the learned trial Judge, I see no ground to interfere with his finding so far as it relates to the manner in which the contract was obtained.

The question of the plaintiff's conduct after he became aware of the fraud presents some difficulty. The day after the agreement was made, the plaintiff says, the first thing Hill did was to propose to organise the company, and that he would open an office and get 15 per cent. for selling the stock. The plaintiff said it was a pretty big commission, and was in direct contravention of the syndicate agreement, which said that no commis-

sion or remuneration is to be paid to any member of the syndicate for any work done, but that the manager of the syndicate is to be paid his disbursements.

It was strongly urged on behalf of the defendants that the plaintiff is not entitled to set aside the agreement entered into between him and them, because, as he states, after he had his suspicions, and knew it was a fraud, he treated the contract as still subsisting, kept in touch with Hill from time to time, and solicited four persons to take stock in the enterprise. He says that he did this, not intending to permit these persons whom he invited to take stock to join the company, but in order that he might get further information in respect of the company through their intercourse with Hill and Catts. He insists that he never intended to affirm the contract, but, on the contrary, to disaffirm it, and that he delayed the matter only that he might get more evidence.

I have carefully examined all of the evidence pointed out, tending to shew his acts in this regard; and, if the plaintiff was speaking the truth, there is sufficient to indicate that he had no intention to affirm the contract, but that, being suspicious and having some knowledge, he was endeavouring to obtain further data upon which he might claim to annul the contract. It may be said that this was an afterthought, and that his conduct alone is to be looked at as to what his intentions were, but his credibility was a question for the trial Judge, and he accepts his evidence and has made a finding that the plaintiff has not ratified or affirmed the contract; meaning, as I take it, that he has not waived his right to have the contract set aside. The evidence establishes the fact, if the trial Judge believed it, as he did, that the plaintiff did not elect to affirm the contract, although he withheld notice from the defendants of his intentions, and acted for some time as if he did intend to affirm.

As to whether or not there was an election in fact depended upon the view the trial Judge took of the evidence, and he in fact finds there was not.

In *Morrison v. Universal Marine Insurance Co.* (1872-3), L.R. 8 Ex. 40, 197, the plaintiff's insurance broker effected an

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insurance with the defendants without disclosing certain information in his possession, which was material. The defendants became possessed of the information which the broker had not disclosed, and they afterwards executed and delivered out the policy without any protest or any notice that they would treat it as void. Upon receiving news of the loss of the vessel, they gave notice to the plaintiff that they did not consider the policy binding upon them. On the trial of the action, the learned Judge directed the jury that the defendants were bound to make their election within a reasonable time after they became aware of the concealment, and left it to them, without expressing any opinion whether the defendants had elected to go on with the policy. The jury having found that the defendants did not so elect, and a rule for a new trial on the ground of misdirection having been obtained and afterwards made absolute in the Court below, it was held (reversing the judgment of the Court below), that this direction was right, and that, there being no election in fact, and no evidence that the plaintiff had been prejudiced by the defendants not electing earlier to disaffirm the policy, the defendants were not estopped from denying its validity, nor was it material to consider whether their conduct in delivering out the policy without a protest had been such as to entitle the plaintiff to consider it as an election. Honynman, J., delivered the judgment of the Court (Exchequer Chamber), and, after referring to the case of a lease, says (p. 204): "In strictness, therefore, the question in such cases is, has the lessor, having notice of the breach, elected not to avoid the lease? or has he elected to avoid it? or has he made no election?" In all this we agree and think that, *mutatis mutandis*, it is applicable to the election to avoid a contract for fraud." He points out (p. 206) that the case below was treated as one of estoppel, "but, according to a long series of cases like *Pickard v. Sears* (1837), 6 A. & E. 469, the estoppel would only arise on proof that the plaintiff had been prejudicially affected by a belief that the defendants were treating the contract as binding."

In Halsbury's Laws of England, vol. 20, p. 738, it is said: "In general a contract induced by misrepresentation is valid until disaffirmed, not invalid until affirmed, that is to say, it is voidable, not void."

“The right which accrues to the representee, on discovery of the real facts, is, in the first instance, a right of choice or election only. Such a right, when once exercised, is exhausted. . . . If he has once elected to avoid, he can never afterwards be allowed to affirm in his own interests:” *ib.*, p. 740; citing *Clough v. London and North Western R.W. Co.* (1871), L.R. 7 Ex. 26, 34.

“If, after discovery of the whole of the material facts giving him a right to avoid the contract, the representee has, by word or act, definitely elected to adhere to it, the representor has a complete defence to any proceedings for rescission:” *ib.*, p. 749. Many cases are cited for this proposition. In note (b) it is said that “it is insufficient to prove partial information, giving rise to suspicion merely; there can be no effective affirmation or election which is not based on complete and exact knowledge. The plea, on this ground, failed in *Jarrett v. Kennedy* (1848), 6 C.B. 319, 326.”

In the same volume, para. 1767, p. 750, it is said: “Affirmation of a contract induced by two distinct misrepresentations, with knowledge of the true facts as regards the one, but not as regards the other, does not debar the representee from relief.” For this is cited *Re London and Provincial Electric Lighting and Power Generating Co., Ex p. Hale* (1886), 55 L.T.R. 670. “But, where the contract was induced by a single representation, and the representee, with knowledge of its falsity in one particular, has affirmed the contract, he cannot escape from the consequences, or defeat the representor’s plea, by proving that, since the affirmation, he has discovered another particular in which the same representation departed from the truth: *Campbell v. Fleming*, 1 A. & E. 40; *Whitehouse’s Case* (1867), L.R. 3 Eq. 790, 794” (*ib.*)

It is pointed out in *Ex p. Hale* that the *Whitehouse* case did not decide that the waiver of one point was a waiver of all, but that the waiver of objection that there was a discrepancy between the company’s prospectus and its memorandum and articles of association amounted to a waiver of any other discrepancy.

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Campbell v. Fleming, 1 A. & E. 40, was a case of the purchase of shares upon representations made to the plaintiff by the agent of the defendants. It appeared that after the purchase the plaintiff formed a new company by consolidating the shares originally purchased by him with some other property, and he sold shares in the new company, thereby realising a considerable sum of money. Littledale, J., said that when the plaintiff learned that an imposition had been practised upon him he ought to have made his stand, and proceeds: "Instead of doing so, he goes on dealing with the shares; and, in fact, disposes of some of them. Supposing him not to have had, at that time, so full a knowledge of the fraud as he afterwards obtained, he had given up his right of objection by dealing with the property after he had once discovered that he had been imposed upon." Parke, J., said: "After the plaintiff, knowing of the fraud, had elected to treat the transaction as a contract, he had lost his right of rescinding it; . . . It is said, that another fraudulent representation was subsequently discovered. I cannot, however, perceive that the evidence goes far enough to shew that such a representation was, in fact, made." Patteson, J., said: "In this case the plaintiff has paid the money, and now demands it back, on the ground of the money having been paid on a void transaction. To entitle him to do so he should, at the time of discovering the fraud, have elected to repudiate the whole transaction. Instead of doing so, he deals with that for which he now says that he never legally contracted. Long after this, as he alleges, he discovers a new incident in the fraud. This can only be considered as strengthening the evidence of the original fraud; and it cannot revive the right of repudiation which has been once waived." Denman, C.J., said: "There is no authority for saying that a party must know all the incidents of a fraud before he deprives himself of the right of rescinding."

Having regard to the facts in the *Campbell* case, I do not think it applicable to the present. There there was an unequivocal act, after knowledge, by dealing with the shares in a manner wholly inconsistent with the invalidity of the contract, and clearly shewing the plaintiff's intention to affirm the same. In

the present case, having regard to the facts as found by the trial Judge, and the credit which he gave to the plaintiff's evidence, I am unable to say that the plaintiff elected to affirm the contract. Fraud having been established, he was entitled to have it rescinded.

The appeal should be dismissed with costs.

MULOCK, C.J.Ex., and SUTHERLAND, J., agreed.

RIDDELL, J.:—This is an appeal by both defendants from the judgment of Mr. Justice Lennox.

The evidence is very voluminous, but the material facts are neither numerous nor obscure.

The defendant Catts was the owner, or at least had the disposal of, a patent for electrical lamps, and was dealing with his co-defendant Hill and the plaintiff in reference thereto. The defendant Hill represented to Carrique that he was putting \$5,000 into the deal, and the two made an agreement to form a syndicate to buy the patent and manufacture the lamps, etc. In this agreement the plaintiff undertook to invest \$5,000 in the syndicate, Hill agreeing, upon receiving notice within three months, to refund him the \$5,000 and to transfer to him shares to the face value of \$5,000 in any company to be formed to take over the patent; the sum of \$5,000 to be paid within one year from date of notice, with interest at 10 per cent. per annum; the stock on the organisation of the company. Hill was also to furnish collateral security for the \$5,000. It was further agreed that if Hill completed a syndicate, including Carrique, with a paid-up capital of \$30,000, and procured any one willing to buy a share at \$5,000, he should have the right to compel Carrique either to abandon his right to the return of his money, etc., and remain in the syndicate, or to accept \$5,000 in full of all his claims.

The two thereupon made a contract with Catts for the purchase of the patent for Canada, for \$25,000, \$10,000 down and \$15,000, or such part of it as should not have been paid out of the earnings of the manufacture and sale of the lamps, in five

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years. They also agreed to establish a factory with all due speed, and pay Catts a royalty of 5 per cent. on net receipts, keep accounts, render statements, etc., etc. Provision was made for the cancellation of the patent and certain other matters not here material.

Before this agreement was signed, Catts represented to Carrique, in Hill's presence, that he had a contract with the Hydro-Electric for a trial installation of his lamps. This was untrue, as Catts knew; and it had the effect of inducing Carrique to enter into the agreement, which he was hesitating to do. Hill's representation that he was putting in \$5,000 was equally false, equally relied upon by Carrique, and equally effective.

Carrique brings an action to set aside the contract with Catts, for return of the \$5,000 he had paid thereunder (Hill had put in some mining stock), and for damages, or in the alternative that Hill should carry out the terms of the syndicate agreement and give the collateral security required by that agreement.

That the sale agreement was procured by the fraud of both defendants is, upon the findings of the trial Judge, which we cannot disturb, undoubtedly true. Much complaint was made by counsel as to the language employed by Mr. Justice Lennox; but those who misrepresent existing facts have no right to complain if their conduct receive vigorous denunciation. We have no concern with the goodness of their motives or with their general business character or reputation for rectitude. If one makes a statement which he knows to be untrue, intending another to believe it, and it is believed, he is guilty of fraud in law, however benevolent his motives and however high standing he may have amongst his associates or neighbours.

We have held that if there be a fraud in law as to any part of that which induces a party to enter into a contract, the party may repudiate the contract: *Beckman v. Wallace* (1913), 29 O.L.R. 96, and see cases cited at p. 101.

Were there nothing more in the case, it is plain that the plaintiff should succeed. But he found out the very next day that one of the statements, i.e., that concerning the arrangement with the Hydro-Electric, was wholly false. This would have entitled him to set aside the contract with Catts. If by conduct or other-

wise he disentitled himself to set aside the contract for this reason, he could not take advantage of any fraud subsequently discovered: *Webb v. Roberts*, 16 O.L.R. 279; *Campbell v. Fleming*, 1 A. & E. 40; *Walton v. Simpson* (1884), 6 O.R. 213.

We must, therefore, examine his conduct between this day, the 6th January, 1912, and the 27th June, 1912, when he issued his writ. What that conduct was is shewn by his own evidence and that of Hill and others.

It is quite clear that he encouraged Hill to endeavour to form the syndicate, that he spoke to at least four persons to come in (although he says he would not have allowed them to come in without giving them full information), that Hill was encouraged by him to have much correspondence with Catts in respect to the lamp; in fact, he acted in all respects as though he was going on with the arrangement. That he wished Hill to believe that he was, he admits; but he says that he was deceiving Hill. This I think not to be the case, but that the fact was that Carrique fully intended to go on with the enterprise for many weeks, and that his determination to repudiate the contract came late in the history of the case. But, assuming that he is telling the truth, I do not think he is advantaged. It is not the intention at the back of a man's head which determines, but the intention as expressed in word or action to the other party upon which he is expected and intended to act. Here, admittedly, Carrique acted in such a way as that Hill would, as he did, incur trouble and labour in carrying out the joint scheme, and Carrique intended that to be the result of his actions. Carrique had no right to induce Hill to take this trouble unless he was going on with the enterprise, and that involved the contract with Catts remaining in force.

So, too, Catts was labouring at the instance of Hill, to Carrique's knowledge, in a manner which could only have occurred by the contract remaining in force.

Moreover, the life of a patent is short in any case, and the selling price of even a valuable patent will depend to a great extent upon the life of the patent still to run.

The duty of one who finds he has been misled, and therefore has the right to rescind a contract, is not doubtful. Having to

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make an election, while mere silence does not amount to an election, or mere delay, at least if not unreasonable, his duty is not to lie by so long as to lead some other person, whether the party against whom the election is to be made or another, to alter his position in the belief that the first named has elected to let things remain as they are; by so doing he will be precluded from making a different election: Halsbury's Laws of England, vol. 13, p 397, sec. 561. "If in consequence of his delay the position even of the wrong-doer is affected, it will preclude him from exercising his right to rescind:" *Clough v. London and North Western R.W. Co.* (1871), L.R. 7 Ex. 26, at p. 35, Mellor, J., giving the judgment of the Court of Exchequer Chamber. "And lapse of time without rescinding will furnish evidence that he has determined to affirm the contract:" *ib.*

This is but a branch or illustration of the general doctrine of estoppel *in pais* laid down in *Pickard v. Sears*, 6 A. & E. 469: "The rule of law is clear, that, where one by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things" (p. 474, *per* Denman, C.J., delivering the judgment of the Court); *Morrison v. Universal Marine Insurance Co.*, L.R. 8 Ex. 197; *Aaron's Reefs Limited v. Twiss*, [1896] A.C. 273, 290, 294; *Civil Service Musical Instrument Association v. Whiteman* (1899), 68 L.J. Ch. 484.

This principle is for the protection of the individual; but there is another for the protection of the public as a matter of public policy. "If a man claims to rescind his contract to take shares in a company on the ground that he has been induced to enter into it by misrepresentation, he must rescind it as soon as he learns the facts, or else he forfeits all claim to relief:" *per* James, L.J., in *Sharpley v. Louth and East Coast R.W. Co.* (1876), 2 Ch.D. 663, at p. 685. "Lapse of time without rescinding will furnish evidence of an intention to affirm the contract. But the cogency of this evidence depends upon the particular circumstances of the case and the nature of the contract in question. Where a person has contracted to take shares in a com-

pany and his name has been placed on the register, it has always been held that he must exercise his right of repudiation with extreme promptness after the discovery of the fraud or misrepresentation:" *Aaron's Reefs Limited v. Twiss*, [1896] A.C. 273, at p. 294.

This would in itself not be conclusive, but the Court proceeds at once to give the reason, thus: "For this reason the presence of his name upon the register may have induced other persons to . . . become members." As it is put in *Palmer's Company Precedents*, 11th ed., p. 197: "Persons may be induced to act on the faith of his membership."

The principles of these remarks apply with full force to the present case. A syndicate in which there were two members looking for others to join, would necessarily owe a great deal of its seductiveness to the personnel of these two. Carrique knew perfectly well that Hill was trying to induce persons to join them; he was not only willing that Hill should do this, but anxious. He would not have interfered with any one joining, except his own friends (so he told us on the argument); he acted in everything as though he intended remaining a member of the syndicate; and on the principle just mentioned he cannot be heard to say that he repudiated the contract.

Of course the syndicate agreement is on a different piece of paper from the contract to purchase; but they were predicated on each other and were integral parts of the same transaction, and the ratification of one was the ratification of the other.

I think that the plaintiff is not entitled to repudiate the contract, by reason of his conduct.

But that does not prevent an action for damages for deceit. The contract may stand, and still an action be taken for damages for the fraud inducing it: *S. Pearson & Son Limited v. Dublin Corporation*, [1907] A.C. 351; *Webb v. Roberts*, 16 O.L.R. 279; *Caldwell v. Cockshutt* (1913), 30 O.L.R. 244.

In the case of *Webb v. Roberts* an attempt was made by the trial Judge to assess such damages at the amount of loss suffered by the defrauded person by reason of his entering into the contract; but the Divisional Court corrected this error and allowed as damages only the difference between the benefit which he

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would have enjoyed had the representations been true and what he did enjoy, the representations being false. The true measure of damages then is to determine what loss the defrauded contractor has suffered by reason of the representations being false, the contract remaining in full force.

No attempt was made at the trial to prove that the plaintiff would have been advantaged a dollar by the representations turning out to be true instead of their being false, as they were. The plaintiff therefore cannot recover damages for the frauds, on the evidence. Nor was the evidence directed to the alternative relief claimed by the plaintiff.

There is a counterclaim on the record by Catts; but the evidence was not directed to the issues there raised. I think we should not dispose of them here and now, but we should dismiss the counterclaim without costs, without prejudice to another action in which all the issues between all parties may be raised in the pleadings, all proper orders obtained for trial of issues between defendants, and the evidence directed specifically to the issues raised. We should also reserve leave to the plaintiff to bring an action, by counterclaim or otherwise, for damages for the frauds complained of, and also for any relief other than setting aside the agreements. The evidence can then be directed to such issues, and the case properly tried.

The judgment for the plaintiff should, I think, be set aside and the action dismissed. As to costs, where one party to a contract has been induced to enter into the contract by fraud, and fails to have the contract rescinded because of his own delay, and that delay is itself fraudulent, I think no one can complain if we do not award costs to any one; all are fraudulent, and the loss of the costs incurred should be left as it falls. There should be no costs here or below.

Appeal dismissed with costs; RIDDELL, J., dissenting

[APPELLATE DIVISION.]

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May 5.
Dec. 24.

REX V. TITCHMARSH.

Criminal Law—Conviction—Motion for Writ of Certiorari—Rules of Supreme Court of Ontario, 1908—Power to Abolish Writ of Certiorari—Criminal Code, sec. 576.

The power to make Rules of Court "for regulating in criminal matters the pleading, practice and procedure in the Court, including the subjects of mandamus, certiorari," etc., conferred upon the Supreme Court of Ontario by sec. 576 of the Criminal Code, R.S.C. 1906, ch. 146, authorises the making of the Rules of 1908, whereby the *writ* of certiorari was abolished, and another mode of bringing the proceedings of inferior tribunals in criminal matters before the Supreme Court was substituted. *Certiorari* is not, though the *writ* is, abolished.

Order of MEREDITH, C.J.C.P., refusing (but with doubt) an application for a *writ* of certiorari to remove a criminal conviction into the Supreme Court, affirmed.

MOTION by the defendant, *ex parte*, for a writ of certiorari to remove a criminal conviction into the Supreme Court of Ontario with a view to having it quashed.

April 7. The motion was heard by MEREDITH, C.J.C.P., in Chambers.

J. B. Mackenzie, for the applicant.

May 5. MEREDITH, C.J.C.P.:—Mr. Mackenzie's unflagging industry, in his searches for such purposes, has discovered two matters which, he contends, shew that there has been a serious flaw in the practice prevailing in this Province upon applications to quash convictions for crimes; and, as a consequence of his discoveries, he asks for a reversion to the older practice which prevailed for so many years before, and until, the adoption of the present practice, in the year 1908, under Rules of Court framed, in the first instance, by Mabee, J.

His points are: that no Court, such as that authorised, in sec. 576 of the Criminal Code, R.S.C. 1906, ch. 146, to make Rules respecting the practice in criminal matters, in this Province, now exists; and, therefore, that the Rules made, at the time I have mentioned, have ceased to have any effect; and that sec. 63 of the Judicature Act, R.S.O. 1914, ch. 56, is not applicable to this case, because it deals with convictions made by a "magis-

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trate" only, whilst the conviction in question was made by "Justices of the Peace;" and this point is persisted in, notwithstanding the meaning given to the word "magistrate" in the Interpretation Act, R.S.O. 1914, ch. 1, sec. 29 (*m*) and (*r*), and in the Interpretation Act, R.S.C. 1906, ch. 1, sec. 34 (15), because there is an interpretation of the word "Justice" contained in the Criminal Code, under which the conviction in question was made, and that interpretation, whilst it includes a "Police Magistrate," does not include "magistrates" generally: sec. 2 (18).

These contentions seemed, and still seem, to me, to have no weight; but another point forced itself upon me during the argument, a point which seemed to me to be of sufficient weight to require further consideration before disposing of the application.

Regarding the points made by Mr. Mackenzie, it may not be at all necessary, for any general purpose, to repeat that which was said respecting them during the argument; but, so that the applicant may be under no misapprehension, I shall do so.

If the Rules of 1908 were well made, why should they fall, even if there were no Court now competent to make any such Rules? There seem to be but two provisions contained in them that might be affected by such a state of affairs, if it really existed: the first is the Rule numbered 1284, which provides that the motion to quash shall be made to a Judge of the High Court of Justice for Ontario, sitting in Chambers; and the other—Rule numbered 1287—is that which gives a right of appeal, by leave, to a "Divisional Court"—a Court which does not now exist; nor does current legislation: 3 & 4 Geo. V. ch. 50 (D.); touch the point.

There is no reason why the Rules, as far as they are applicable, should not be applied by any Court, in the Province, having power to quash convictions. Why should they cease to have force and effect any more than the Act itself should?

But it is quite erroneous to say that no such body, or that no such Court, now exists: the same body and the same Court exist, with the exception of the "Divisional Court," and they have existed all along, entitled to exercise and exercising the

same powers, and performing the same duties: the name has been, in some respects, changed, and the manner of performing such duties, and exercising such powers, has been in some respects varied; but nothing more.

If, however, Mr. Mackenzie were quite right in his contentions, that quite a new Court had come into being, and that there are no Rules, or practice, applicable to it, why should not such Court adopt as its practice the procedure embodied in the Mabee Rules? Until some binding legislation, or Rules, should be enacted, the Court, having jurisdiction to quash, could, and would, necessarily, be obliged to, lay down some mode of procedure. See *Robinson v. Bland* (1760), 1 W. Bl. 234, 256, 264.

Upon the other point, there was no need of any deep study of the meaning of the word "magistrate;" nor of the exercise of any ingenuity in a vain endeavour to overcome the plain words of the interpretation enactments; because, obviously, the provisions of the Judicature Act cannot apply to this case. Being a provincial enactment, it can have no effect on procedure in criminal matters; which a motion to quash a conviction of a crime must be; because such procedure comes within the exclusive legislative power of the Parliament of Canada, and is excluded from the legislative power of Provincial Legislatures: the British North America Act, 1867, sec. 91, clause 27; and sec. 92, clause 14.

So that Mr. Mackenzie's points seem to me to be, obviously, quite ineffectual.

But I still have some trouble with the question whether there was any power to make the Rules of 1908.

They were made, in so far as they were to be applicable to criminal matters, under the section of the Criminal Code, now numbered 576, which conferred all such power as was intended to be exercised in making the Rules, in these words: "Every superior court of criminal jurisdiction may . . . make rules of court; . . .—(b) for regulating in criminal matters the pleading, practice and procedure in the court, including the subjects of mandamus, certiorari, habeas corpus, prohibition, quo warranto, bail and costs . . . and (c) generally for regulating the duties of the officers of the court and every other

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matter deemed expedient for better attaining the ends of justice and carrying the provisions of the law into effect. . . .”

The general words of the section are, I think, restricted by these words, covering the very subject in question; and, having regard especially to the words, “including the subjects of mandamus, certiorari, habeas corpus, prohibition, quo warranto,” I find it difficult to get out of my mind the doubt whether there was power to do more than regulate the existing practice in certiorari proceedings—the doubt whether there was power to abolish the certiorari proceedings altogether, and substitute entirely different proceedings.

Abolition, as well as prohibition, is quite incompatible with regulation: you cannot regulate that which you have destroyed, or even prohibited. This is obvious; the one question is: Do these Rules abolish “*the* . . . procedure in the court”—of “certiorari”?

What certiorari is, is not in any sense uncertain. Every one at all familiar with the practice of the Courts of Law knows that certiorari is, in such Courts, a writ; a writ issued out of a Court of law, having power to grant it, in the name of the Sovereign and tested by the Chief Justice, by virtue of that Court’s superintending authority over all Courts of inferior criminal jurisdiction in the Province, for the purpose of a supervision of any of their proceedings which may be investigated in such Superior Court. Except in cases where legislation has provided for an appeal, the writ of certiorari is the only mode by which a revision of proceedings on summary convictions can be had in a higher Court. And “*the* procedure” in certiorari is the procedure begun by, and dependent upon, the writ of certiorari.

To abolish the writ of certiorari is to abolish “certiorari;” and, having regard to the well-known, the unmistakable, meaning of the word, under a practice that has continued for hundreds of years, there can be no manner of doubt that Parliament, in making use of the word “certiorari,” intended it to carry that plain meaning: that is made doubly certain by the use of the other technical words associated with it, “habeas corpus,” “mandamus,” “quo warranto.” But the Mabec

Rules do not merely abolish the writ, they abolish the whole practice, lock, stock, and barrel, and create another of an entirely different character and name. Certiorari is gone, in all cases such as this.*

No reasonable person, having a knowledge of the subject, would contend that power given to regulate the practice on the subject of writs of habeas corpus in criminal cases, conferred power to abolish the writ and practice altogether; and yet, if there were power to do away with the writ of certiorari, there was, equally, power to abolish the writ of habeas corpus and the other writs named in the legislation and the whole of the long-existing procedure under them; quite too great a power to be acted upon if there were, at the most, even only a doubt as to the power; quite too much power to assume on doubtful language. Though I am strongly in favour of abolishing all writs, and all other unnecessary proceedings, and have long advocated it, that cannot rightly be done, in such a case as this, without clear legislative authority. I can call to memory no case in which that has been done other than by legislation or by Rules confirmed by legislation.

Parliament has not said, unrestrictedly, that the Provincial Court may create a new practice in all criminal matters, nor that it may change the practice altogether; its language is quite restrictive in dealing with this particular subject; the Court may only regulate the practice in "certiorari"; that is, the familiar long-continued practice under the writ of certiorari; it may not, expressly, even regulate the practice on motions to quash convictions, but only in certiorari. Regulate "the practice"—not the subject—of certiorari; that is, the existing practice.

But the applicant has not relied upon this ground, and may not desire to do so, and as, ever since the making of the Rules, the Courts have acted upon them, the better way to deal with this motion is to dismiss it, and give leave, under these Rules, to the applicant, to appeal; an appeal which, if taken, may also answer the purpose of determining whether there is any Court,

*Rule 1279: In all cases in which it is desired to move to quash a conviction, order, warrant or inquisition, the proceeding shall be by a notice of motion in the first instance instead of by certiorari, or by rule or order nisi.

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now existing, to which an appeal can be made; another question of grave importance.

I have delayed disposing of this application so as to learn whether the question I have last dealt with was discussed at the time of the making of the Rules; and am now informed that it was, and that the view, then entertained, was, that the Rules are *intra vires*; but, of course, that does not bind any one; the appellant is entitled, if he desires to do so, to have the point judicially determined.

The application is refused; and leave to appeal is given.

The defendant appealed, by leave, from the decision of MEREDITH, C.J.C.P.

December 15. The appeal was heard by MULOCK, C.J.Ex., MACLAREN, J.A., CLUTE, RIDDELL, and SUTHERLAND, JJ.

J. B. Mackenzie, for the appellant. No warrant for enacting the Rules of Court passed on the 27th March, 1908—1279 to 1288 inclusive—is furnished by the Criminal Code, sec. 576. Clause (b) authorises the framing of Rules of Court “regulating . . . the pleading, practice and procedure,” etc. Forms of expression, it will be noted, occur here which clearly point to limited or curtailed authority, in respect of the matters in question, as being reposed in those whom the statute empowers to act. To begin with, a *regulating* power alone is conferred, not something capable of working the revolutionising effect which supersession of the historic writ of certiorari would occasion. Then whatever action may be taken must not be inconsistent with any statute of Canada. From time immemorial, the writ of certiorari has been acknowledged to be a prerogative writ, issuing out of the Court of King’s Bench, to remove all proceedings of Justices of the Peace, or subordinate tribunals or persons, in general, evidencing a judicial stamp or character, to the end that the Court may—inquiring into them—be certified of their origin, or of the steps marking their inception, progress, or completion. And, if we except the habeas corpus, no safeguard against error or abuse in the exercise of power by inferior bodies or individuals,

of equal potency, has been placed within the subject's reach. Indeed, with that solitary exception, it must be held to rank above all remedial processes which the full storehouse of our jurisprudence affords; and one may easily observe how unchangingly, as the years go by, the superintending authority opposes every inroad upon its might and efficacy, as a medium it has at its command, that was designed, above all things, to subserve the interests of any subject appearing to be in jeopardy. Section 576, conferring authority to pass the Rules in question, in reality permits nothing more to be done—warrants no larger power to be exercised under it—than sec. 17 of the English Judicature Act, 1875, in which appear, standing agreeably with the context, these words, “any further or additional Rules of Court . . . and in particular for all or any of the following *matters*.” It has been determined that, by this phraseology, no control in respect of points of jurisdiction may be assumed. In *Longman v. East* (1877), 3 C.P.D. 142, at p. 156, Brett, L.J., says: “Where in the same statute are found clear enactments as to *jurisdiction*, and enactments as to *procedure*” (as many of the sections from 1120 to 1126 of our Code deal with one as with the other of these contrasted subjects) “under that jurisdiction, the latter must be construed, if possible, to make them consistent with the former, and not so as to enlarge the jurisdiction.” See Short & Mellor's *Crown Practice*, 2nd ed., p. 5. See also *Regina v. Flynn* (1891), 20 O.R. 638, as to the distinction between the essential and the accidental. The true import of sec. 576 may fairly be gathered by transposing the words of clause (b) so as to allow the branch of the clause, “including the subjects of,” etc., to begin it, rather than have it stand where it does, the former being purely accessory to the other. “Certiorari” and “writ of certiorari,” here, as in England, are throughout used interchangeably: Paley on Convictions, 8th ed., pp. 561, 562; 5 Geo. II. ch. 19, sec. 2; 13 Geo. II. ch. 18, sec. 5. Further, where Parliament has intended to eliminate or dispense with some time-honoured auxiliary of the law, it does not leave the matter in doubt by the use of equivocal phraseology. Section 1127, for example, reads: “If a motion or rule to quash a conviction,” etc., “is refused or discharged, it shall not be necessary to issue

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a writ of *procedendo*, but the order of the Court . . . shall be a sufficient authority," etc. The common law attendants upon a writ of certiorari, the *alias*, *pluries*, and finally the attachment, could not be invoked for disobedience of a mere order: *Regina v. St. Clair* (1900), 27 A.R. 308, 309, 310. See also *Re Frankland* (1872), L.R. 8 Q.B. 18; *Cremetti v. Crom* (1879), 4 Q.B.D. 225. The writ of certiorari *in aid* was held in *Rex v. Nelson* (1908), 18 O.L.R. 484, not to be affected by the Ontario statute of 1908, the enactments of which appeared originally in the form of Rules passed by the Judges of the Supreme Court of Judicature; and the ruling as to this was, in *Rex v. Graf* (1909), 19 O.L.R. 238, extended to the case of a conviction made, as here, under a Dominion Act. Abolition, moreover, of the writ would be inconsistent with every section of the Criminal Code which is found to preserve it, or from which its survival may be deduced—notably sec. 1122 and the last part of sec. 1126. By these are distinctly perpetuated many characteristics of the writ, which, as it were, stands out as the pivot around which mere practice and procedure is observed to turn.

Edward Bayly, K.C., for the Attorney-General for Ontario. The change made by the Rules of 1908 was in respect of the subject of certiorari, not the writ. They changed the former practice of three motions to one motion, before a Judge in Chambers. The only things to be decided here are, what is certiorari, and are the new Rules *intra vires*? I am here upholding the new Rules. See sec. 576 of the Criminal Code and 3 & 4 Geo. V. ch. 50 (D.) Did the new Rules regulate the practice in respect of the subject of certiorari? I say yes.

Mackenzie, in reply.

December 24. The judgment of the Court was delivered by RIDDELL, J.:—The defendant was convicted of cruelty to animals, under sec. 542 of the Code. Instead of proceeding in the manner prescribed by the Rules of 1908, the defendant chose to apply for a writ of certiorari. This was refused by the learned Chief Justice of the Common Pleas; and the defendant now appeals.

A reasonable case is made out on the merits for the matter being brought into the Supreme Court, and this the Crown ad-

mits. Accordingly, if the practice still exists and the Rules of 1908 are invalid, the writ should go.

The learned Chief Justice must have decided that the practice prescribed by the Rules of 1908 is to be followed. Notwithstanding that he has expressed great difficulty in coming to the conclusion he does come to, his decision is not doubtful.

It seems to me, with much respect, that the doubt arises from confusing "certiorari" and the "writ of certiorari."

The word "certiorari" is simply the present infinitive passive of *certioro* (= *certiorem facio* and from *certus*, *certior*), used only in juridical Latin, meaning "I inform, apprise, shew;" and it is taken from the original form of the writ.

The theory is that the Sovereign has been appealed to by some one of his subjects who complains of an injustice done him in an inferior Court; whereupon the Sovereign, saying that he wishes to be informed—*certiorari*—of the matter, orders that the record, etc., be transmitted into a Court where he is sitting. This order is put in the form of a writ, which is the only and the conclusive evidence of such order. The form of the writ (when proceedings were in Latin) can be seen in any old edition of Fitz-Herbert's *Natura Brevium*—my own edition is that of 1730, and the writs are set out on pp. 548 *sqq.* The Library edition is of 1794, and the writs are there given in translation and not in Latin: pp. 242 *sqq.* The verb "certified" is the translation of "certiorari."

The whole proceeding of removal into a Court where the King may be "certified" is the *certiorari*; the means by which his order is made known is the writ. So long as by some means the record etc. are got before the King, the means is unimportant, the effect the same. If the King were to (effectively) change his method of procedure and cause the record etc. to come into his Court by some other process than by signifying his pleasure by a writ, surely that could not be called an abolition of *certiorari*, although the writ might be abolished.

It is most true that innumerable instances may be adduced in which the word "certiorari" is used judicially and in text-books and legal dictionaries as synonymous with "writ of certiorari;" but that is in the same way as we constantly speak of "injunc-

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tion," meaning now "an order of injunction," but formerly "a writ of injunction"—"prohibition," meaning "an order of prohibition," but till the other day "a writ of prohibition." It could not, I venture to think, be said that injunction, prohibition, etc., were abolished or interfered with when the writ went by the board; nor can it be said that (civil) certiorari is abolished since our Rule (now Rule 623) abolished the writ.

In the same way I quite fail to understand how the abolition of the writ of certiorari in criminal matters has any greater effect. The remedy exists; the manner of obtaining it is different—that is all.

The King now says, "I desire to be certified of the matters, etc., and I am to be so informed by the record, etc., being produced in obedience to a notice by the complainant," instead of a formal writ under seal.

I think that the judgment is right and that the appeal should be dismissed.

Appeal dismissed.

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Dec. 24.

WEIR V. HAMILTON STREET R.W. CO.

Highway—Obstruction—Trolley Pole Erected by Street Railway Company in Public Street between Tracks — Injury to Travellers by Vehicle Striking Pole at Night—Absence of Light or other Safeguard—Negligence—Nuisance—Contributory Negligence—Findings of Jury—Statutory Authority—36 Vict. ch. 100 (O.)—Municipal By-law—Liability of Company.

The defendants, a street railway company, incorporated under 36 Vict. ch. 100 (O.), were authorised by sec. 7 to construct their railway upon and along such streets in the city of H. as the council of the city by agreement might authorise, and subject to by-laws made in pursuance thereof, and to construct and maintain all necessary works, appliances, and conveniences connected therewith. By sec. 15, the city corporation and the defendants were authorised to make agreements relating to the construction and location of the railway, and the particular streets along which it should be laid, and the non-obstructing or impeding of the ordinary traffic. Section 16 gave the city corporation authority to pass by-laws for the purpose of carrying such agreement into effect and to regulate the traffic and conduct of persons travelling upon the streets through which the railway should pass. The defendants' railway was constructed and operated under various agreements and by-laws until 1892, when a new agreement was made and a by-law passed by the city council authorising the operation of the railway by electricity and the

erection of all necessary poles and wires for the completion of the railway upon the trolley system. The streets upon which the railway was to be operated were specified, and the public were given the right to travel upon the tracks, provided they did not impede or interfere with the defendants' cars. It was also provided that the poles should be placed on the sides of the streets, except in a part of K. street, where they should be placed on the devil's strip between the two tracks; and all the poles were to be placed in such manner as to obstruct as little as possible the use of the streets for other purposes. The poles and wires were erected accordingly, and the railway operated. Afterwards, that part of K. street referred to was narrowed, but the poles were left between the tracks. In 1913, the plaintiffs, who were driving in a motor car, at night, along K. street, ran into one of the poles upon the devil's strip, which was unguarded and unlighted, and were injured. In an action brought to recover damages for the plaintiffs' injuries, the jury found the defendants guilty of negligence, in that "the trolley poles should have been placed in a uniform position along the entire thoroughfare;" that the plaintiffs could not, by the exercise of reasonable care, have avoided the accident; and assessed damages in favour of two of the plaintiffs. Upon appeal by the defendants from the judgment entered upon these findings:—

Held, that to leave a pole erected in such a place unlighted at night was to create a dangerous nuisance; and the jury, upon the evidence, might well consider the pole an obstruction to the highway, and so leaving it an act of negligence.

2. That the power of a Provincial Legislature and of a municipal corporation to interfere with a public highway is a limited one; it does not go the length of authorising something to be done which will endanger the safety of the travelling public and create a common nuisance. It was incumbent on the defendants to shew some express statutory warrant for the maintenance of the pole in the position and condition in which it was; and, even if such warrant could be considered to be given or properly inferred from the statute and by-law, it could not be deemed to extend further than this, that a pole could lawfully be placed in such a position when all needed precautions were taken to safeguard the public.

Review of the authorities.

Atkinson v. City of Chatham (1899), 26 A.R. 521, and in the Supreme Court of Canada, *sub nom. Bell Telephone Co. v. City of Chatham* (1900), 31 S.C.R. 61, specially referred to.

3. That the findings of the jury could not, upon the evidence, be disturbed, and the judgment should be affirmed (HODGINS, J.A., dissenting).

Per HODGINS, J.A.:—The authority to construct the railway along the streets and to maintain all necessary works, appliances, and conveniences connected therewith, and the reservation to the municipality of the right to deal with the non-obstruction and impeding of ordinary traffic, and to pass by-laws dealing with the regulation of the traffic along the streets occupied by the railway, taken together, gave legislative sanction to the doing of something that might obstruct and impede, and delegated to the city corporation authority to deal with that feature. It is not consistent with our theory of municipal government to hold that the *bonâ fide* exercise of those powers could be controlled or interfered with by the Courts. If the placing of the pole in the position indicated was proper, yet authority to place it there might not absolve the defendants from the duty of using all proper diligence to prevent injury therefrom; and it might be that the maintenance of the pole in its place, after the street was narrowed, was negligent and improper without further precautions being taken. The judgment should be set aside, and there should be a new trial, so as to allow the plaintiffs to urge any ground open to them, having regard to the maintenance of the pole and the change in the condition of the street.

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APPEAL by the defendants from the judgment of LATCHFORD, J., upon the findings of a jury, in favour of two of the plaintiffs, viz., Robert Weir and Gladys Weir, in an action for damages for personal injuries sustained by the plaintiffs when a motor car in which they were driving ran against an upright pole planted by the defendants in a street in the city of Hamilton. The plaintiffs alleged that the pole was negligently placed and left unguarded and unlighted, and was a dangerous obstruction in the highway.

June 2. The appeal was heard by MULOCK, C.J.Ex., HODGINS, J.A., and SUTHERLAND and LEITCH, JJ.

D. L. McCarthy, K.C., for the appellants, argued that, as the poles were ordered to be placed where they were by the direction of the City Engineer, the defendants were not liable. He referred to the appellants' Act of incorporation, 36 Vict. (O.) ch. 100, secs. 7, 16, as shewing that leave had to be obtained by by-law from the city to erect poles, in accordance with which by-law No. 624 was passed on the 26th March, 1892, and was in force at the time of the accident. The poles were put up under the authority of this by-law after being located by the City Engineer. In this connection reference was made to clauses 28 and 31 of the by-law. The appellants were under the control of the city as to the location of the poles, and had no power to put them anywhere else. I rely on sec. 13 of the Street Railway Act in force at that time, R.S.O. 1887, ch. 171, sec. 13, as shewing the power of the city to authorise the construction; also to the Municipal Act, R.S.O. 1887, ch. 184, secs. 282, 283, 530, 531.

H. Howitt, for the plaintiffs Robert Weir and Gladys Weir, the respondents, argued that there was no provision allowing poles of this kind to be erected in such a place, either at common law or by statute. The doing so constituted a nuisance at common law which it would require express words to justify: Halsbury's Laws of England, vol. 16, pp. 151, 152; *Atkinson v. City of Chatham* (1899), 26 A.R. 521, 525; *Bell Telephone Co. v. City of Chatham* (1900), 31 S.C.R. 61; *City of Montreal v. Mulcair* (1898), 28 S.C.R. 458, *per* Gwynne, J., at pp. 469, 470; *Bonn v. Bell Telephone Co.* (1899), 30 O.R. 696, 703, 704, and

cases there referred to; *Senhenn v. City of Evansville* (1894), 140 Ind. 675. The by-law is not validated by making it an appendix to the special Act 56 Vict (O.) ch. 90, nor by the reference to it in sec. 4, sub-sec. 4, of that Act. Express legislative enactment is required in such a case. Even if the power to erect the poles existed, the public should have been safeguarded in some way such as having a red light upon them, of which there is no evidence here.

McCarthy, in reply, argued that the telephone cases had no bearing, and that the remarks of Maclellan, J.A., in the *Atkinson* case were not necessary to the decision. The by-law is not an appendix to the special Act, but a schedule, and it has the effect of a statute: see Halsbury's Laws of England, vol. 27, para. 214.

December 24. SUTHERLAND, J.:—An appeal from the judgment of Latchford, J., in an action tried by him with a jury at Toronto on the 21st April, 1914. The action arose out of a motor car accident in the city of Hamilton on the night of the 23rd May, 1913. In the car at the time were the plaintiff Robert Weir, the owner thereof, and the other plaintiffs, namely, his daughter Gladys and James Cowan Kent and Caroline Kent.

The car ran into an upright pole of the defendant company in King street, and was damaged and its occupants injured. The plaintiffs alleged that the pole "had been negligently placed, maintained, and left unguarded and unlighted in the travelled portion of King street, by the defendants, so as to constitute a dangerous trap for passers-by."

The defendant company pleaded that they were not responsible in law for any injuries sustained or damages suffered by the plaintiffs; that the pole had been placed in its position by the order, under the supervision, and to the satisfaction of the Municipal Corporation of the City of Hamilton, and that the plaintiffs could have avoided the accident by the exercise of ordinary care.

The defendant company had delivered a third party notice to the Municipal Corporation of the City of Hamilton, and by an order of the Master in Chambers, dated the 9th December,

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1913, the latter were ordered, within seven days from the service of the order, to deliver to the plaintiffs and the defendants respectively a defence or statement of points upon which they would rely at the trial, and given liberty to appear by counsel thereat in the usual way and for the usual purposes. In pursuance of such order, the municipal corporation delivered a defence setting forth that they would rely upon the defence of the defendant company, and denying all negligence on their part.

At the trial the action was dismissed without costs as regards the plaintiffs Kent. The jury, in answer to questions, found the defendants guilty of negligence, in that "the trolley poles should have been placed in a uniform position along the entire thoroughfare;" and that the plaintiffs could not, by the exercise of reasonable care, have avoided the accident; and they assessed the damages at \$735 and \$300 respectively for the plaintiffs Robert and Gladys Weir.

The poles of the defendant company, at the point where the accident occurred, were erected upon King street, one of the streets of the municipality. The plaintiff Robert Weir, who was driving the car, was not familiar with the locality, and the night was rainy and misty. The car had been driven along James street, and at the corner of King street turned easterly along that street, proceeding along the south side thereof, which under ordinary circumstances would be the proper side for the driver to take.

On the south side of King street, the two tracks of the defendant company were, on account of the gore or park in the street, located much nearer to the south than to the north side, and between them there was the usual devil's strip of about 5 feet in width. The car was being driven so that the wheels on the north side ran along the devil's strip and those on the south side between the rails of the south track, and it was travelling at about 12 or 13 miles an hour, when suddenly it came in contact, at a point about 75 feet east of the intersection of Hughson street, the next street east of James street, and King street, with a trolley pole which had been placed there on the devil's strip, and was the first of a series of poles along that strip in front of the gore.

It appears that along King street, up to the point where the car came in contact with the pole, the travelled portion of the street was not obstructed by trolley poles, as they were erected at the side of the street. It appears also that to any one well acquainted with the condition of the street at that point there was ample space on the north side of the tracks for motor cars and other vehicles to pass one another without difficulty.

Under these circumstances, the defendant company appeal on the following grounds: (1) that the case should have been taken from the jury, there being no scintilla of evidence which could in law be construed as negligence on the part of the defendants; (2) that the "negligence found by the jury is not in law negligence on the part of the defendants, and that, on the answers of the jury and on the evidence adduced at the trial, judgment should have been entered for the defendants;" (3) that the trial Judge erred in directing the jury that "if the municipality was liable as a matter of law for an accident caused if it had erected the trolley pole, then as a matter of law the defendants, the Hamilton Street Railway Company, might also be held liable;" (4) that the defendants, in placing the poles in the manner indicated in the evidence, "acted in pursuance of the statutory authority delegated to the City of Hamilton, and, the provision as to the position of the poles being directory and not permissive, the defendants could not be responsible for any damages resulting therefrom;" and (5) that the "finding of the jury negating contributory negligence on the part of the plaintiff Robert Weir is perverse and against the weight of evidence."

After a careful perusal of the evidence, I am unable to see that the finding of the jury that there was no contributory negligence on the part of the plaintiff Robert Weir can be considered perverse, or should be disturbed, or the case on this ground sent back for a new trial.

I think, in the light of the evidence, the finding of the jury as to the defendants' negligence amounts to this, that it was negligence on their part, instead of continuing their trolley poles in a uniform position at the side of the street along the highway, to shift or change them in front of the gore or park to

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the devil's strip, and so in the way of vehicular traffic that the result was to create a trap.

In my opinion, to leave a pole erected in such a place unlighted at night was to create a dangerous nuisance.

I think the placing of a pole in the position and condition in which this was might well be considered by the jury to be an obstruction to the highway and an act of negligence, and that the trial Judge could not have taken the case away from the jury.

The defendant company were incorporated under an Ontario statute of 1873, 36 Vict. ch. 100, and thereby authorised to construct their railway upon and along such streets in Hamilton as the council of the city by agreement might authorise, and subject to by-laws made in pursuance thereof, "and to construct and maintain all necessary works, buildings, appliances, and conveniences connected therewith" (sec. 7), and "to make and to enter into any agreement or covenants relating to the construction of the said railway . . . the location of the railway, and the particular streets along which the same shall be laid," etc. (sec. 15).

The city, by sec. 16, was authorised to pass by-laws "for the purpose of carrying into effect any such agreements," etc. The company applied to the municipality for leave to locate and construct their lines in the city, and an agreement was entered into and a by-law passed to give effect thereto.

At the time of the accident, by-law No. 624, passed on the 26th March, 1892, was in force. It recites that previous by-laws had been passed in the years 1873, 1882, and 1888, conferring certain rights and privileges on the defendant company, subject to the conditions therein contained. It also recites that the previous by-laws provided that the cars of the railway company should be drawn by horses and mules only, and that the company were desirous of constructing an electric railway, and it had been agreed that the previous by-laws should be repealed and previous agreements terminated.

Clause 1 gave authority to the defendant company to construct an electric street railway "and to erect all necessary poles and wires," etc.

Clause 2 mentioned the streets to which the permission and authority should extend, King street being one named.

Clause 2 provided that all poles should be "placed on the side of the street, except on King street between Hughson and Mary streets, where they shall be placed between the tracks" (no doubt on account of the gore), "and all poles of the company shall be placed in such manner as to obstruct as little as possible the use of the streets for other purposes."

Clause 31 provided that "all works of construction and repair . . . shall be placed under the supervision and to the satisfaction of the city engineer."

The poles were put up by the defendant company after being "located" by the city engineer.

Reference was made during the argument to the Street Railway and Municipal Acts in force at the time of the incorporation of the company, and subsequent amending or repealing Acts. But in none of them have I been able to find any express or explicit authority given to a municipality to erect or authorise any other corporation or person to erect a pole in the nature of an obstruction on the travelled portion of a highway. Nor do I find any such authority in the defendant company's Act of incorporation. At common law there was no such right. "It is a nuisance at common law either to neglect any legal duty in respect of a highway, or to hinder or prevent the public from passing freely, safely, and conveniently along it," etc.: Halsbury's Laws of England, vol. 16, p. 151. "Whether an obstruction . . . amounts to a nuisance is a question of fact for the jury:" p. 152. "The following are instances of acts which may be found to be nuisances: . . . to erect, without statutory powers, telegraph or other posts in the soil of a highway:" pp. 153, 154; citing *The Queen v. United Kingdom Electric Telegraph Co.* (1862), 31 L.J.N.S. M.C. 166.

The municipality is by statute required to keep its highways in repair, and can in a civil action be made to answer in damages for an injury sustained in consequence of its failure to do so.

When the defendant company have placed on the travelled portion of a highway a pole in such a position that a jury has

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found it to be an act of negligence, it is incumbent on the company, I think, to shew some express statutory warrant for its maintenance in that position. I am of opinion that the company have failed to do so, and that the judgment appealed from must stand.

But, even if such warrant can be considered to be given or properly inferred from any of the acts referred to, it could not, I think, be deemed to extend further than this, that poles could only be erected in such a position when all needed precautions were taken to safeguard the public, as, for example, by lighting them at night. Here the evidence, before us is that no red or other light was upon the pole. Reference to *Geddis v. Proprietors of Bann. Reservoir* (1878), 3 App. Cas. 430, 455, 456; *Metropolitan Asylum District Managers v. Hill* (1881), 6 App. Cas. 193, 208.

Reference was made upon the argument to cases in which the question of the right of the Bell Telephone Company to erect poles in municipalities was in question. That company was incorporated under a Dominion Act of Parliament which gave it exceptionally wide powers.

In *Bonn v. Bell Telephone Co.* (1899), 30 O.R. 696, it was held that "a telephone company having permission by its Act of incorporation to erect poles on the streets of towns and incorporated villages, so as not to interfere with the public right of travel, is not relieved from liability for damages when it plants the poles on the highway in such a way as to become an element of danger to the public, although, as required by the Act of incorporation, the poles are planted under the supervision of the municipality."

In *Atkinson v. City of Chatham*, 26 A.R. 521, it was held, affirming the judgment of the trial Judge, that a pole placed in the travelled portion of the highway was an illegal obstruction thereon, causing it to be out of repair within the meaning of the Municipal Act. Maclellan, J.A., at p. 522, says: "*Primâ facie* it was an unlawful obstruction and nuisance upon the street, and having stood there for four years, with the knowledge of the city corporation, they must be held liable for the accident, unless they are able to shew that it was placed and maintained

where it stood by competent authority." And at p. 524: "The public right is to travel upon and use the street with safety; therefore, the poles must be placed along the side or sides, so as to give the public the largest possible degree of safety, consistent with their existence; anything short of that is not a compliance with the legislation. . . . I think it is very evident that it was a dangerous obstruction where it stood, and that it would have been very much less dangerous if placed near the sidewalk, instead of being within eleven and a half feet of the centre of the street. . . . Inasmuch, therefore, as the pole was placed in a dangerous position, when it might have been placed in one much less dangerous, it follows that the city are responsible for the accident, because it was their duty to remove it." And Moss, J.A., at p. 528, says: "But for the company's Acts of incorporation" (the company being the Bell Telephone Company) "43 Viet. ch. 67 (D.) and 45 Viet. ch. 95 (D.), the erection or placing of poles anywhere on the highway would have been an obstruction and a public nuisance: *Regina v. United Kingdom Electric Telegraph Co.*, 9 Cox C.C. 137 and 174."

In this case of *Atkinson v. City of Chatham*, the plaintiff succeeded at the trial, the trial Judge having found upon the evidence that the accident was caused by the plaintiff's sleigh coming in contact with the telephone pole, and without any contributory negligence on his part. The trial Judge also held that the pole had been erected under the supervision of the proper officer of the defendant company, and the city corporation was liable, but was not entitled to indemnity from the Bell Telephone Company, which had been brought into the action as a third party, the city corporation claiming indemnity from it. The Court of Appeal dismissed the appeal of the City of Chatham from the judgment as regards this plaintiff, but allowed its appeal as against the Bell Telephone Company, and directed that judgment for indemnity be entered in its favour in this respect.

An appeal was taken to the Supreme Court of Canada, and its judgment is reported, *Bell Telephone Co. v. City of Chatham*, 31 S.C.R. 61, reversing the judgment of the Court of Appeal, on

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the ground that "a person driving on a public highway who sustains injury to his person and property by the carriage coming in contact with a telephone pole lawfully placed there, cannot maintain an action for damages if it clearly appears that his horses were running away and that their violent, uncontrollable speed was the proximate cause of the accident."

I refer also to *Toronto Corporation v. Bell Telephone Co. of Canada*, [1905] A.C. 52; *Senhenn v. City of Evansville*, 140 Ind. 675; *Attorney-General v. Barker* (1900), 16 Times L.R. 502, at p. 504.

The power of a Provincial Legislature and of a municipal corporation to interfere with a public highway is a limited one. It does not go the length of authorising something to be done which will endanger the safety of the travelling public and create a common nuisance. As erected and maintained, this obstruction was dangerous to those lawfully using the highway as the plaintiffs were doing when the accident occurred. It was, therefore, a common nuisance and a violation of the criminal law. No statutory enactment of a Provincial Legislature or by-law of a municipal corporation could, under these circumstances, give it legal sanction.

I think the appeal fails on all grounds, and must be dismissed with costs.

MULOCK, C.J.Ex., concurred.

LEITCH, J., being ill, took no part in the judgment.

HODGINS, J.A.:—In *Bonn v. Bell Telephone Co.*, 30 O.R. 696, it is stated by Boyd, C. (p. 703), that according to our law, "based on that of England, the telephone company has no right to use the streets without legislative sanction, either directly, or indirectly through the action of properly authorised municipal bodies." This statement equally applies to the appellants here.

The question, therefore, in this case, is, whether the appellants were empowered to place the pole in question where they did through the action of a properly authorised municipal body.

That they did so place it in its specific location in accordance with by-law 624 of the City of Hamilton is manifest from the words of sec. 28 of that by-law.

The evidence of Francis H. Taylor, employed by the appellants in 1892, is to the effect that the then City Engineer, Mr. Haskins, directed where the poles were to be placed, and he goes on to say: "In the centre, those were marked by a stake drove into the old cedar blocks. The gore extension was not there then. The present street railway tracks was like the middle of the street."

This explains why between Hughson and Mary streets the poles occupy a position between the tracks, because the present gore extension, a small park now forming a continuation, across Hughson street, of the gore, did not exist, but in its place was a street much wider than between Hughson and James streets. In fact the width would be about 125 feet. This would require a long suspension of wire across the street, and involved danger, according to McCallum, the present City Engineer of Hamilton. The present position of affairs is not that of 22 years ago. The then situation, when apprehended, indicates that the placing of the poles where they now are was dictated by a desire to avoid electrical risks, and yet leave ample room on either side for traffic. The authority of the appellants to place the pole where they did, is, of course, the by-law to which I have already referred, and its validity depends upon whether the City of Hamilton had legislative sanction for the passing of that by-law in the form in which it appears.

The statute incorporating the appellants is 36 Viet. ch. 100 (1873). By sec. 7 of that Act the appellants were authorised and empowered to construct, maintain, complete, and operate a double or single iron railway . . . upon and along streets and highways in Hamilton under and subject to any agreement thereafter to be made between the City of Hamilton and the appellants and under and subject to any by-laws of the said city made in pursuance thereof, and to take, transport, and carry passengers and freight upon the same, by the force or power of animals or such other motive power as the appellants might be authorised by the said city to use, and to construct and main-

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tain all necessary works, buildings, appliances, and conveniences connected therewith. By sec. 15, the City of Hamilton and the appellants were authorised to make and enter into any agreements or covenants "relating to the construction of the said railway . . . the location of the railway, and the particular streets along which the same shall be laid . . . and the non-obstructing or impeding of the ordinary traffic." Under sec. 16, authority was given to the City of Hamilton to pass by-laws "for the purpose of carrying into effect any such agreements or covenants, and containing all such necessary clauses, provisions, rules, and regulations for the conduct of all parties concerned, including the company . . . and for regulating the traffic and conduct of all persons travelling upon the streets and highways through which the said railway may pass."

By-law 624 is very long and contains many particular directions. The appellants were thereby authorised to construct an electric street railway with double or single tracks upon and along the streets of the city of Hamilton, and "to erect all necessary poles and wires and overhead or single construction along such streets for the completion of the railway upon the trolley system."

The streets are specified, and the public are given the right to travel upon the tracks, provided they do not impede or interfere with the cars of the appellants. There is also reserved the right to the City of Hamilton to make such further rules, regulations, orders, and by-laws in relation to the construction, repair, and operation of the railway, as may be deemed necessary to provide for the safety, welfare, and accommodation of the public, but not so as to impair the substantial rights of the company. Then follows the provision that the poles "shall be placed on the sides of the streets except on King street, between Hughson and Mary streets, where they shall be placed between the tracks, and all the poles of the company shall be placed in such manner as to obstruct as little as possible the use of the streets for other purposes."

The statute which I have already mentioned empowers the City of Hamilton to enter into agreements with the appellants for the construction of the railway, and the railway company

to construct the same under and subject to these agreements, and subject to any by-laws of the municipality made pursuant to the agreements. Without more, it might be said that, as the construction of a railway upon and along the streets must necessarily involve obstruction to the public passing over those streets, some measure of obstruction was legalised. The legislation goes further. The City of Hamilton is empowered to make agreements with the appellants "for the non-obstructing or impeding of the ordinary traffic," and to pass by-laws "for regulating the traffic and conduct of all persons travelling upon the streets and highways through which the said railway may pass." This implies, it seems to me, a discretion in that direction, and not a prohibition of any and all obstruction. It is to be observed that the right of the public to have the highway unobstructed is not confined to the *via trita*, but extends to the whole width of the highway as such: *The Queen v. United Kingdom Electric Telegraph Co.*, 31 L.J.N.S.M.C. 166; *Turner v. Ringwood Highway Board* (1870), L.R. 9 Eq. 418; and the laying of the rails itself is an obstruction: *The Queen v. Train* (1862), 31 L.J.N.S. M.C. 169. Hence the authority to construct this railway along the streets and to maintain all necessary works, appliances, and conveniences connected therewith, and the reservation to the municipality of the right to deal with the non-obstruction and impeding of ordinary traffic, and to pass by-laws dealing with the regulation of the traffic along the streets occupied by the railway, taken together, give legislative sanction to the doing of something that may obstruct and impede, and delegates to the City of Hamilton authority to deal with that feature. The Act which gave the City of Hamilton this power is to a great extent the same as the general Act relating to Street Railways, R.S.O. 1887, ch. 171, sec. 12, which was continued in the same form until 1906, and the provisions as to non-obstruction and the regulation of traffic are substantially and almost verbally similar. They are in contrast to the legislation regarding telegraph poles, which, as in the case of telephone poles, were required to be erected so as not to impede or incommode the public use of the street. See R.S.O. 1877, ch. 151, sec. 1; R.S.O. 1887, ch. 158, sec. 1; R.S.O. 1897, ch. 192,

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sec. 1. In 1906, the Ontario Railway Act, by secs. 56, 192, 197, and 217, changed the provisions quoted so as to assimilate them to the conditional legislation applying to telephone and telegraph companies.

The effect of such a statutory restriction, as pointed out in *Bonn v. Bell Telephone Co. (ante)*, is to make it a question of fact in each case whether the poles unreasonably interfered with the full use of the highways so as to become an element of danger to the public. The position here is different from that dealt with in that case, in that the broad right of the public to object to any obstruction in any part of the highway as a breach of the statutory restriction is contrasted with that right modified by the authority given to the municipality to deal with the question itself. In the *Bonn* case, the direction by the municipality to place the poles in a specified position was held not to override the statutory condition of non-interference with the public use. But here the motive power authorised by the Act included the electric trolley system, and its use upon and along the streets necessitated the maintenance thereon of the necessary works, the construction of which is expressly provided for. How can it be said that the erection of poles on the side of the *via trita* but within the limits of the roadway is legal and that the placing thereof in the former is prohibited, if both are within the boundaries of the highway?

The principle enunciated by Boyd, C., which I have already quoted, is formulated by Crompton, J., in *The Queen v. Train*, 31 L.J.N.S. M.C. at p. 173, in these words: "When parties introduce a new mode of conveyance, which is not suitable to the old road, they must take the almost constitutional course of getting an Act of Parliament, by which they are put under such regulations as will protect the public."

Under our Municipal Act large powers are given to municipalities to restrict and regulate traffic and the portions of the road which may be travelled by different users thereof, and the Act in question here seems to me to leave to the City of Hamilton the duty of protecting the public so far as may be necessary, consistently with the powers given for the construction and operation of a street railway thereon. Provisions similar to

those in the statute incorporating the appellants will be found in the legislation regarding the London, Ottawa, and Kingston Street Railways, and the Hamilton Radial Railway, and possibly other like undertakings.

It is not consistent with our theory of municipal government to hold that the exercise of those powers, when exercised *bonâ fide*, can be controlled or interfered with by the Courts.

The by-law, in secs. 4, 5, 6, 7, 13, 16, 17, 19 (*g, i, l, m*), 21, 28, 31, deals with the rights of public traffic on the streets.

In my view, the law as laid down by the learned trial Judge was too broadly stated. Under it the discretion of municipalities with regard to streets would be much impaired, and some useful and ornamental methods of dealing with our streets might have to disappear. But it is clear that if the placing of the pole by the appellants was proper under the circumstances of this case, yet authority to place it there might not absolve the company from using all due and proper diligence to prevent injury therefrom, as by placing a light thereon: *Manley v. St. Helen's Canal and R.W. Co.* (1858), 2 H. & N. 840: and it may be that its maintenance, after the street was narrowed by the formation of the gore extension, was negligent and improper without further precautions being taken: *McLoughlin v. Warrington Corporation* (1910), 75 J.P. 57.

Reference was made on the argument to the case of *Atkinson v. City of Chatham*, 26 A.R. 521, *Bell Telephone Co. v. City of Chatham*, 31 S.C.R. 61. I do not think that anything said in that case conflicts with the views I have expressed. It may be noted that in the Supreme Court it is stated that the pole in question stood outside the portion of the road set apart for vehicular traffic under a by-law of the City of Chatham which is printed in the appeal case, but is not referred to in the reports in the Courts below.

Under these circumstances, and without expressing any opinion that the appellants and not the City of Hamilton might be responsible, I think the judgment should be set aside and a new trial should be had between the parties, so that, if the respondents desire it, they may urge any ground open to them,

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having regard to the maintenance of the pole and to the change in the condition of the street where it stands.

The costs of this appeal and of the trial should be paid by the respondent.

Appeal dismissed; HODGINS, J.A., dissenting.

[APPELLATE DIVISION.]

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MITCHELL AND DRESCH V. SANDWICH WINDSOR AND AMHERSTBURG
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Dec. 24.

Street Railway—Extension of Lines upon Streets of City—Authority—Agreements with City Corporation—By-laws—Private Acts—Municipal Franchises Act, 2 Geo. V. ch. 42, secs. 3, 4—Ontario Railway Act, 3 & 4 Geo. V. ch. 36, secs. 232, 250, 251—Approval by Ratepayers of By-law Authorising Extension—Confirmation by Ontario Railway and Municipal Board—Nuisance—Peculiar Damage—Parties—Municipal Corporation—Injunction—Mandamus—Damages.

The plaintiffs, suing on behalf of themselves and all other ratepayers of the city of W., sought to restrain the defendants, an incorporated company, from constructing a line of railway, an extension of their existing railway, upon certain streets of the city; a mandamus to the defendants to restore the streets, so far as interfered with, to their original condition; and damages. The city council, by a by-law of the 27th April, 1914, purported to authorise and empower the defendants to construct the extension. This by-law was not submitted to the ratepayers for approval, and was not confirmed by the Ontario Railway and Municipal Board:—

Held, having regard to the original charter of the defendants, the Ontario statute 35 Vict. ch. 64, the subsequent statutes 50 Vict. ch. 80, 56 Vict. ch. 97, and 3 Edw. VII. ch. 112, certain by-laws of the city of W. and agreements between the defendants and the city corporation, and also to the provisions of sec. 569 (1) of the Consolidated Municipal Act, 1903, 3 Edw. VII. ch. 19, 10 Edw. VII. ch. 81, secs. 3, 4, the Municipal Franchises Act, 2 Geo. V. ch. 42 (R.S.O. 1914, ch. 197), secs. 3, 4, and the Ontario Railway Act, 3 & 4 Geo. V. ch. 36, secs. 232, 250, 251, that the defendants' right to use the streets referred to for their railway rested upon the agreements with the city corporation of the 17th April, 1893, and the 4th July, 1893, as modified by the agreement of the 28th July, 1902, validated by 3 Edw. VII. ch. 112; and, that being a special Act passed before the 16th March, 1909, the date mentioned in sec. 4 (2) of the Municipal Franchises Act, the application of sec. 4 of that Act to the defendants' franchise was excluded, and it was not compulsory upon the city corporation to submit the by-law authorising the construction of the railway on the streets referred to for the approval of the ratepayers.

But *held*, that, the defendants being subject to the provisions of the Ontario Railway Act, the proposed extension came within the meaning of sec. 250, sub-sec. 2, and required the sanction of the Board, notwithstanding the terms of the agreements. The new sub-sec. 3 of sec. 250, requiring the approval of the Board, came into force on the 1st July,

1913; the acts complained of by the plaintiffs occurred in April, 1914; and, the sanction of the Board not having been obtained, those acts were without authority and illegal, and created a nuisance on the streets referred to.

Held, also, that the plaintiff D. suffered peculiar damage by reason of the acts of the defendants upon these streets.

Held, also, that the city corporation was not a necessary party to the action.

Judgment of LENNOX, J., granting the plaintiffs the relief prayed for, affirmed.

THE plaintiffs brought this action, on behalf of themselves and all other ratepayers of the City of Windsor, for an injunction restraining the defendants from constructing a street railway line upon certain portions of Ferry street, Chatham street, and Victoria avenue, in the said city, and for a mandatory order upon the defendants requiring them to restore the streets to their original condition, and for damages and costs.

The action was tried before LENNOX, J., without a jury, at Sandwich.

J. H. Rodd, for the plaintiffs.

A. R. Bartlet, for the defendants.

June 30. LENNOX, J.:—The plaintiffs ask for an injunction restraining the defendant company from constructing a street railway line upon certain portions of Ferry street, Chatham street, and Victoria avenue, in the city of Windsor, and a mandamus compelling the company to restore the portions of these streets in so far as they have already interfered with them, and for damages.

For some years the defendants have held franchises as to certain streets and parts of streets in Windsor, but it is not pretended that any of them cover the line in question. The by-laws conferring them were all passed prior to the 16th April, 1912, and none of them were assented to by the electors.

On the 27th April, 1914, by by-law No. 1713, the Municipality of the City of Windsor purports to authorise and empower the defendant company "to construct a line of railway from Sandwich street, in the city of Windsor, south along Ferry street to Chatham street, thence along Chatham street to the intersection of Victoria avenue, thence along Victoria avenue to

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London street, with suitable curves on Sandwich, Pitt, Chatham, and London streets," being the line of railway the construction of which the plaintiffs seek to enjoin.

This by-law was not submitted to the people as required by statute. The by-law has no legal effect. It does not touch the question.

It is argued that the Corporation of the City of Windsor is a necessary party. I do not think so. No right or interest of the city is being questioned or attacked; not even by-law 1713, if the municipality can be said to be interested in it. The situation is this. The plaintiffs complain and shew that they are being injured, and in a way special and particular to themselves, by the acts of the defendant company upon certain highways. *Primâ facie* to break the roadbed of the highway and obstruct it is a wrong—and an actionable wrong at the suit of the persons injured where it causes them special damage; and it is none the less a wrong when done by a railway company. The defendant company must desist or establish a justification. They seek to do this by what they call the authority of the municipality. The statute says that authority cannot be so conferred. The document they set up does not prevent their being wrong-doers as against the plaintiffs—they are ordinary trespassers causing special and peculiar damages to the plaintiffs by reason of the situation of their properties. I find nothing to oust my jurisdiction by reason of the powers conferred upon the Ontario Railway and Municipal Board.

There will be judgment for an injunction and mandatory order in the terms prayed for, and a reference to the Master at Sandwich to assess the damages sustained by each of the plaintiffs—judgment for these damages as found, and for the costs of the action and reference.

The defendants appealed from the judgment of LENNOX, J.

November 6. The appeal was heard by MULOCK, C.J.Ex., CLUTE, RIDDELL, and SUTHERLAND, JJ.

I. F. Hellmuth, K.C., and *G. A. Urquhart*, for the appellants, argued that under their charter and the various agreements

with the Corporation of the City of Windsor, the appellants had a franchise and authority to do the work complained of, and that the statute 2 Geo. V. ch. 42, the Municipal Franchises Act, had no application, neither applying to their charter nor affecting their rights. The learned trial Judge had treated the matter as if the appellants must rely on the by-law of the 27th April, 1914. This was not so. Authority by resolution of the city council was sufficient, without a by-law at all: *City of Toronto v. Toronto R.W. Co.* (1906), 12 O.L.R. 534, at p. 544; *City of Winnipeg v. Winnipeg Electric R.W. Co.* (1912), 1 W.W.R. 964, at p. 975. Counsel then referred to the various statutes, by-laws, and agreements upon which they based their contentions, and which are set out below. There was no necessity for securing the consent of the Ontario Railway and Municipal Board to the undertaking. The city corporation was not a necessary party to the action.

J. H. Rodd, for the plaintiffs, respondents, contended that the appellants were bound to secure the consent of the Board before beginning the work in question, under sec. 250 of the Ontario Railway Act, 3 & 4 Geo. V. ch. 36. He also relied upon the provisions of the Municipal Franchises Act. The appellants should have had the assent of the electors.

Hellmuth, in reply.

December 24. The judgment of the Court was delivered by CLUTE, J.:—The plaintiffs sue on behalf of themselves and all other ratepayers of the City of Windsor, and charge that the defendants have commenced to construct a line of railway from their tracks on South Windsor street, in the city of Windsor, south along Ferry street to Chatham street, thence west to Victoria avenue, and thence south to London street, and in so doing have torn up the pavement on portions of the said streets; that the work was done without authority, and has made the streets impassable.

The plaintiff Dresch is the owner of lot 14 on the west side of Ferry street, and is erecting a four-storey building thereon, and, by reason of the conditions caused by the defendants, he has been obstructed and delayed and hindered in his work, and

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further charges that the value of his property has been depreciated by the construction of the line, as Ferry street is too narrow to accommodate an electric railway; and the plaintiffs ask for an injunction to restrain the defendants from proceeding with their work, and for a mandatory order requiring them to restore the streets to their original condition, and for damages and costs.

The defendants, besides denying the allegations of the plaintiffs' statement of claim, plead that they are authorised by special Acts of the Legislative Assembly of the Province of Ontario, and by by-laws of the Corporation of the City of Windsor, to construct the works aforesaid. They also state that the plaintiffs have no status to bring this action, and that the Corporation of the City of Windsor is a necessary party. They further plead that the Ontario Railway and Municipal Board has exclusive jurisdiction to interpret the various franchises granted by the city. The writ was issued on the 8th April, 1914.

It was held by the learned trial Judge that the by-law of the 27th April, 1914, of the Municipality of the City of Windsor, purporting to authorise and empower the defendants to construct the line of railway in question, not having been submitted to the people as required by law, has no legal effect, and he granted the injunction and mandatory order, with a reference to the Master to assess the damages, and held that the Corporation of the City of Windsor was not a necessary party.

Upon the argument it was urged by counsel for the appellants that, under their charter and the various agreements with the Corporation of the City of Windsor, they had a franchise and authority to do the work complained of; and that the Municipal Franchises Act, 2 Geo. V. ch. 42, has no application to their charter and does not affect their rights.

It will be necessary, therefore, to examine somewhat closely the Acts, agreements, and by-laws under which the defendants claim the right to construct the line complained of.

Their original charter was an Act to incorporate the Sandwich and Windsor Passenger Railway Company, 35 Vict. ch. 64 (O.) Section 4 of this Act authorises the company to construct a railway from any part of the town of Sandwich to any

part of the town of Windsor, and to continue the same to any part of the village of Walkerville, and to use and occupy such of the streets and highways and bridges, if any, of the said places, as may be required for the purposes of the railway and track; provided that the streets of the said towns, not being part of the gravel road therein mentioned, shall not be so occupied unless by the permission of the municipal councils of these towns, expressed by by-law, which shall regulate the same. Section 13 provides that the towns of Sandwich and Windsor, and the adjoining municipalities in Ontario, are authorised to enter into any agreements or covenants with the company relating to the repairing, etc., of the highways, and also relating to the construction and equipment of the said railway along and upon any other street, and along any other route than the one described. Section 14 provides that the said towns and municipalities are authorised to pass by-laws, and to amend or repeal the same, for the purpose of carrying into effect any such agreements or covenants, and containing all necessary provisions relating thereto.

The company, requiring re-organisation, and desiring to extend the railway to some point within the township of Amherstburg, obtained another Act, 50 Vict. ch. 80 (O.), whereby sec. 1 of the Act of incorporation was repealed, and a body corporate was constituted under the name of "The Sandwich Windsor and Amherstburg Railway." The extension of the railway was to be commenced within two years and completed within four years of the passing of the Act (sec. 3). The company was authorised to extend the railway from the terminus thereof in the town of Sandwich to any part of the town of Amherstburg, and to continue the same from the town of Windsor to any part of the village of Walkerville, subject to the terms of the agreement as set forth in schedule A of the Act. The Act was assented to on the 23rd April, 1887. Schedule A, referred to in the Act, is a memorandum of agreement, dated the 26th March, 1887, between the Corporation of the Town of Windsor and one Alfred Kennedy, and refers to the paving and repairing of the streets, etc.

On the 17th April, 1893, an agreement was entered into be-

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tween the Corporation of the City of Windsor, the Sandwich Windsor and Amherstburg Railway, and the Windsor Electric Street Railway Company. The agreement recites that the Corporation of the Town of Windsor theretofore passed by-laws granting permission to the Windsor company to use certain portions of Sandwich street for street railway purposes, and entered into certain agreements defining the terms and regulating such user; that the said corporation passed by-laws granting permission to the Sandwich company to use certain streets for their railway, and entered into certain agreements with that company defining the terms and regulating such user; it further recites that the said two companies are desirous of obtaining permission to use certain other streets or portions of streets in the city of Windsor for the construction and operation of their railways, and that such permission should be available to them and to any company purchasing the property of the Windsor company, and in case of amalgamation or purchase, and that the corporation has agreed to grant the terms and conditions and to pass a by-law confirming this agreement. It then provides (1) that, in lieu and instead of the franchises and permissions heretofore granted by the Corporation of the City of Windsor to the Windsor company, "permission is hereby granted to the said Windsor company, their successors and assigns, to construct, alter, equip, maintain and operate an electric street railway of the standard gauge, with necessary turn-outs and switches, upon and along Sandwich street from the easterly limit to the westerly limit of the corporation and upon and along Campbell avenue from Sandwich street to London street.

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"The corporation also grants permission to the Windsor company . . . to make connections with the track of the Sandwich company at the junction of Sandwich street and Ouellette street, and at the junction of Ouellette street and Campbell avenue, and at any other points where such tracks may meet or cross each other. . . .

"2nd. That, in lieu and instead of the franchises and permissions heretofore granted by the corporation to the Sandwich company, permission is hereby granted to the said Sandwich

company, their successors and assigns, to construct, maintain and equip an electric railway along Ouellette street from Sandwich street to Wyandotte street, thence along Wyandotte street to the easterly limit of the corporation, and also from Ouellette street along London street to the westerly limit of the corporation," and to make all necessary connections at these streets, and at other points where the tracks may meet or cross each other.

"3rd. That permission is hereby granted to the Sandwich company to construct, equip, maintain and operate an electric street railway on Ouellette street from Wyandotte street to the Tecumseh road, which shall be completed not later than the 1st September, 1893. . . .

"4th. That the Corporation of the City of Windsor, recognising the fact that the construction of the Ouellette street extension is in advance of the immediate requirements of the city . . . the company will not receive an adequate return for their expenditure . . . the council hereby grants to the said Sandwich company, their successors and assigns, the sole right to construct and operate street railways from the west line of farm 78 to the east line of farm 86 in the city of Windsor, and from Tecumseh road to the Detroit river, for a period of twenty years from and including the year 1893."

I understand the admission of counsel to be that the streets in question are within the boundary of the description in clause 4 above given.

"5th. That, in consideration of the permission hereby granted to the said two companies, the said two companies, their successors and assigns, shall annually on the 15th day of December, for a period of 10 years from and including the year 1893, pay to the treasurer of the corporation the sum of \$500 and at the end of the said 10 years and for a period of 10 years thereafter from the sum of \$1,000.

"6th. The said two companies, their successors and assigns, shall during the said period have also the first right to construct and operate street railways upon and along any of the other streets in the said city, provided, however, that if the companies, their successors or assigns, shall neglect or refuse to commence

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the construction of any new line on any of such other streets or portions of streets within three months after being requested by a two-thirds vote of the council of the said city to build such line, or shall fail to complete any such line within 9 months from such request, the corporation may grant to any other company the right to build such line within 9 months from their granting such right . . . and if such other company fail to build the same within such 9 months, then the two companies, parties thereto, their successors and assigns, shall again have the right to build the same, subject however to the same proviso if they again fail to (or) neglect after such request by a two-thirds vote."

This agreement is annexed to by-law number 783, passed on the 17th April, 1893, which enacts: "(1) That the form of agreement thereunto annexed contains the permissions granted to and to be henceforth enjoyed by the Sandwich Windsor and Amherstburg Railway and by the Windsor Electric Street Railway Company to construct and operate street railways in the city of Windsor from and after the execution of such agreement by the said two companies and by this corporation. (2) That, upon such agreement being executed by the said companies and the corporation, . . . thenceforward this by-law and such agreement shall take effect and come into force, and all by-laws heretofore passed by this corporation relating to either of such railways shall stand repealed and all agreements between this corporation and either of them shall be null and void."

By 56 Vict. ch. 97 (O.), assented to on the 27th May, 1893, the Sandwich Windsor and Amherstburg Railway, thereafter called the company, were authorised (sec. 1) to construct and operate an extension of their existing line from a point in the town of Sandwich, and thence easterly through the township of Sandwich West, and along Sandwich street in the city of Windsor, and through the town of Walkerville and the township of Sandwich East, to the Pilette road in said last mentioned township; provided that the streets of the city and towns, or the highways of any municipality, shall not be occupied or used by the company for such extension, unless by the permission, approval, and consent heretofore or hereafter given by the muni-

cipal council of the said city and towns and municipalities, expressed by by-law regulating the same. Section 10 provides that the said railway shall be operated subject to such agreement in respect thereof as shall be first made between the said company and the municipality, and under and subject to any by-law or by-laws of the council passed in pursuance thereof; and the work shall be so done as not to incommode the public use of any such street or highway, nor to be a nuisance thereto, nor to impede the free access to any house or other building erected in the vicinity of the same, or to endanger the same. By sec. 11 the said railway is declared to be and to have been since the date of the *incorporation of the said company a railway within the meaning of the Railway Act of Ontario*, "but notwithstanding anything in this Act contained, the agreement set forth in schedule A of the Act" 50 Vict. ch. 80 "shall to all intents and for all purposes remain and be as valid, binding and effectual . . . as if this Act had not been passed." Section 12 extends the time for the completion of the railway for 18 calendar months from the passing of this Act, and the extension of the said railway hereby authorised shall be commenced within one year, and finally completed within three years, from the passing of this Act.

A further by-law was passed on the 19th June, 1893 (number 790), reciting that since the passing of by-law 783 and the execution of the agreement of the 17th April, 1893, letters patent had been granted incorporating the City Railway Company of Windsor, which said company supersedes and takes the place of the company in the by-law and agreement called the Windsor Electric Street Railway Company, and it is deemed necessary to amend the said by-law and agreement. The by-law enacts that the said by-law 783 passed on the 17th April, 1893, and the agreement authorised by the said by-law and duly executed on the said day, are amended by substituting for the name of the Windsor Electric Street Railway Company, wherever the same occurs therein, the name of the City Railway Company of Windsor. Section 2 provides that clause 3 of the said agreement be and the same is hereby amended by substituting for and in lieu of "the Sandwich company" the words "The City Rail-

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way Company of Windsor.” By sec. 3, this by-law shall come into force and take effect on and from the 19th June, 1893, conditional upon the City Railway Company of Windsor signifying their acceptance of the amendments made in secs. 1 and 2 of this by-law, and duly making the said company a party to the said agreement by the hand of the president and secretary and the seal of the company within 30 days after the passing of this by-law, and failure on the part of the said company so to do shall have the effect of nullifying and shall nullify this by-law.*

On the 28th July, 1902, an agreement was entered into between the Corporation of the City of Windsor and the Sandwich Windsor and Amherstburg Railway and the City Railway Company of Windsor, validated by statute of Ontario, 3 Edw. VII. ch. 112, and set out in schedule A of the said Act. The agreement recites that the franchises granted by the terms of the agreement of the 17th April, 1893, expire on the 31st December, 1912; and declares that the Sandwich company intends to commence and complete the extension of its railway to Amherstburg, and requests the extension of its franchises and agreements until the 31st day of December, 1922. The statute extends the period for a further period of 10 years up to and including the 31st December, 1922, and the said two companies

*The agreement of the 4th July, 1893, referred to later in the judgment, was made between the Corporation of the City of Windsor, called “the corporation,” the defendants, called “the Sandwich company,” the Windsor Electric Street Railway Company, called “the Windsor company,” and the City Railway Company of Windsor, called “the City company.” It recited the passing of by-law 783, the execution of the agreement of the 17th April, 1893, the Act 56 Vict. ch. 97, the issue of letters patent incorporating the City Railway Company of Windsor, and by-law number 790. The operative part of the agreement was as follows: 1. The Windsor company hereby surrenders to the corporation the permissions heretofore granted to that company, and the corporation accepts such surrender and releases that company from the agreement of the 17th April, 1893. 2. The agreement of the 17th April, 1893, is hereby amended and the permission mentioned in the first clause thereof is granted to the Sandwich company instead of the Windsor company, and the permission mentioned in the third clause of such agreement and the privilege and right mentioned in the fourth clause of such agreement are hereby granted to the City company instead of the Sandwich company. 3. The Sandwich company and the City company hereby assent to such amendments and accept the grants to them respectively, and agree that their successors and assigns shall pay the corporation the respective annual sums in the fifth clause mentioned, as therein stated, and agree that the said agreement as amended hereby shall in all respects apply to and be binding on them, their successors and assigns. (Clause 4 provided for the giving of a security bond.)

shall then "give up and abandon . . . to the corporation the exclusive right to construct and operate electric street railways and electric railways within the limits mentioned in *paragraphs 4 and 6*" of the said agreement dated the 17th April, 1893; provided, however, that they shall have the first right to construct an extension of their street railway system within said corporation and upon such of the highways thereof as the council may consider of advantage, and the said extensions shall be constructed and operated upon the terms and conditions contained in said two agreements and in this agreement; "the said right shall be exercised within three months from the time that the corporation notifies the parties of the second part in writing that another company has made an application for the use of the streets of the City of Windsor . . . and calling upon the said parties of the second part" (the said two companies) "to build said railway, and in the event of their refusing to construct the same within six months thereafter, then the said corporation may grant the right to construct and operate the railway upon such streets or highways to another company." Paragraph 3 reserves the right to the corporation to grant permission to any suburban line to construct a railway on any street not in use by the said companies. There are further provisions as to other electric railway companies desiring to enter the city over the said company's lines, that do not bear upon this case. Certain changes are also made in respect of the said money payment. It is further provided (paragraph 10) that this agreement shall be read as a part of the said two agreements, and (paragraph 11) is only to be binding upon the parties in the event of the Sandwich company extending its line of railway to the town of Amherstburg on or before the 17th March, 1904, and until that company shall have constructed the said line and it is in operation the terms of the said two agreements shall be in full force and effect.

The said agreement was, on the 28th July, 1902, by by-law, adopted, ratified, and confirmed, and is declared to be and become a part of the by-law as if embodied therein.

On the 2nd February, 1914, the council adopted a report of the Industrial and Transportation Committee declaring: "That

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the present and future convenience to the patrons of the street cars could be secured by granting the railway the right to construct a line from Sandwich street south along Ferry street to Chatham street, thence along Chatham street to Victoria avenue, and thence along Victoria avenue to London street, and with suitable curves on Sandwich, Pitt, Chatham, and London streets."

If this concession is made, the company promises to operate its cars in a certain manner stated by the committee. Accordingly by-law number 1713 was passed by the Municipal Council of the City of Windsor on the 27th April, 1914. It enacts that the Sandwich Windsor and Amherstburg Railway be and it is hereby directed and empowered to construct a line of railway "from Sandwich street in the city of Windsor south along Ferry street to Chatham street, thence along Chatham to the intersection of Victoria avenue, thence along Victoria avenue to London street, with suitable curves on Sandwich, Pitt, Chatham, and London streets," upon the conditions stated. Section 3 of the by-law declares that the said railway as hereby directed to be constructed shall be subject to such terms and conditions as are contained in the agreements between the city and the company dated the 17th April, 1893, and the 4th July, 1902, save as herein changed or altered, and in the event of the company failing to carry out the terms of this by-law the rights and franchises herein contained shall be declared void, and the rights of the company and the city shall be those contained in the agreements and by-laws heretofore passed and entered into.

Section 569 (1) of the Consolidated Municipal Act, 1903, declares that by-laws may be passed by the councils of cities and towns for building and operating street railways over such streets of the city or town and subject to such terms as the Lieutenant-Governor in Council may approve, with this proviso: "that the powers conferred by this sub-section shall not apply to a municipality in which there is an existing street railway constructed or operated under any agreement or contract between the municipality and any street railway company."

This proviso is repealed by 10 Edw. VII. ch. 81, sec. 4, and the following substituted for it: "Provided that the powers

conferred by this section shall not be exercised in respect of any street or part of a street in, along, or upon which a street railway company is entitled under an agreement with the municipality to construct and operate its railway, so long as such right shall continue to exist, and any question or dispute as to whether a street railway company is so entitled, shall be determined by the Ontario Railway and Municipal Board."

Section 3 provides that a railway company shall not begin the construction of its railway or of any extension of it upon any highway without having first obtained the permission and approval of the Ontario Railway and Municipal Board.

The Municipal Franchises Act, 2 Geo. V. ch. 42, provides (sec. 3) that a franchise is not to be granted without the assent of the electors to use or occupy any of the highways of the municipality or to construct or operate thereon any railway, etc. Section 4, sub-sec. 1, provides that any extension of present works shall not be made except under the authority of a by-law hereafter passed with the assent of the municipal electors. Sub-section 2 provides that sub-sec. 1 shall not apply to franchises granted before the 16th March, 1909; but no such franchise or right shall be renewed, nor shall the term thereof be extended, by a municipal corporation except by by-law passed with the assent of the electors as provided by sec. 3. This Act repeals 9 Edw. VII. ch. 75 and 10 Edw. VII. ch. 87. And the enactment re-appears in the Ontario Railway Act, 3 & 4 Geo. V. ch. 36, sec. 250, with the following clause as sub-sec. 3, which is new: "This section shall apply to any addition to or alteration of the line of the railway as constructed, and shall apply notwithstanding the terms of any agreement between the company and any municipal corporation."

By sub-sec. 4, this section applies to all railways, however operated, and to street railways. Section 251 provides that nothing in this Act shall authorise the passing of any by-law, the making of any agreement, the granting of any franchise or privilege, or the doing of any other thing in contravention of the Municipal Franchises Act. This section is new. The Municipal Franchises Act now appears in R.S.O. 1914 as ch. 197.

The foregoing Acts, agreements, and by-laws culminate in

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the agreements of the 17th April, 1893, and the 4th July, 1893, as to the rights of the defendants down to that date, and shew that the defendants had the sole right to construct and operate their street railway over the streets in question, the same being within the limits described in paragraph 4 of the agreement of the 17th April, 1893; subject to their refusal so to do on request of a two-thirds vote of the council. This exclusive right was modified to the extent mentioned in the agreement of the 28th July, 1902, ratified and confirmed by by-law of the same date and by 3 Edw. VII. ch. 112, where it appears as schedule A. The rights, franchises, and permissions to construct and operate an electric railway within the city of Windsor and upon the highways of the said city are hereby extended for a further period of 10 years to and including the 31st day of December, 1922; by which last named agreement the defendants give up and abandon to the City of Windsor the *exclusive* right to construct and operate electric street railways within the limits mentioned in paragraphs 4 and 6 of the agreement of the 17th April, 1893. The defendants, however, have the first right to construct an extension of their street railway system upon such highways as the council considers to be of advantage. No doubt, the city council had this clause in view when it passed the resolution and by-law requesting and authorising the construction of the railway on the streets, the doing of which is complained of in this action.

A resolution was passed on the 2nd February, 1914, before, and the by-law on the 27th April, 1914, after, the defendants commenced the construction of their railway on the streets in question. Clause 11 of the agreement of the 28th July, 1902, provides that the agreement is only to be binding upon the parties thereto in the event of the Sandwich company extending its line of railway to Amherstburg on or before the 17th March, 1904, and until such extension was completed the terms of the earlier agreements, namely, of the 17th April, 1893, and the 4th July, 1893, are in force.

The by-law passed on the 27th April, 1914, authorising the work complained of, is made subject to the terms of all three agreements, namely, of the 17th April, 1893, the 4th July, 1893,

and the 28th July, 1902; and, as I find no evidence that the extension to Amherstburg was not completed in time, we may assume that it was.

The effect of the agreement of the 28th July, 1902, was not to surrender the defendants' franchise granted under the agreement of the 17th April, 1893, but only the exclusive right to such franchise, and such partial surrender was further limited by reserving the first right to construct an extension of its street railway system. The effect, therefore, of these agreements, by-laws, and the Act of 3 Edw. VII. ch. 112, is to give to these defendants the first right to erect the line in question on the request of the city by resolution or by-law (if that be necessary) without submission to the electors, unless some statute renders such submission necessary to give validity to the act of the council. To decide this point an examination of the following Acts of the Legislature is necessary:—

The Municipal Act, R.S.O. 1897, ch. 223, sec. 569, sub-sec. 1, authorises the construction of street railways by cities and towns, but does not apply where there is an existing street railway constructed or operated under an agreement between the municipality and the street railway company. This is repeated in the Municipal Act, 1903, sec. 569(1) as above set out; and by 10 Edw. VII. ch. 81, sec. 4, the proviso is repealed and a new proviso substituted, as above set out.

By this provision the Ontario Railway and Municipal Board shall determine as to whether a street railway company is so entitled. By sec. 3 (1) of 10 Edw. VII. ch. 81, it is provided that a railway company shall not, without having first obtained the permission and approval of the Board, begin the construction of its railway or of any extension of its railway upon any highway or part of a highway upon which it has authority to construct or extend its railway, and the Board has power to withhold its permission and approval whenever it is of opinion that it has not been made to appear that the construction or extension upon such highway is necessary or convenient for the public service, or whenever, in the opinion of the Board, it is not in the public interest; (2) this section applies to a street railway. This section re-appears in the Ontario Railway

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Act, 3 & 4 Geo. V. ch. 36, sec. 250, to which is added the new sub-section above quoted, extending the section to any addition to or alteration of the line, and making it apply notwithstanding the terms of any agreement between the company and any municipal corporation.

The defendants being subject to the provisions of the Ontario Railway Act, the building of the proposed extension is within the meaning of sec. 250, sub-sec. 2, and requires the sanction of the Board, and this notwithstanding the terms of the agreements between the Corporation of the City of Windsor and the defendants. The new sub-sec. 3 of sec. 250 came into force on the 1st July, 1913 (see sec. 304), and the acts complained of occurred in April, 1914, so that it appears that, while the assent of the council was proper and within the agreements between the city and the defendants, the authorisation of the Board was a further condition precedent imposed by the Legislature to entitle the defendants to begin the construction of their line on the streets in question.

It will be seen, upon reading secs. 232 and 250 of the Ontario Railway Act, that the first gives authority to the corporation of a city or town to equip and operate a railway along and over the highways of the city, subject to the approval of the Board, but that such power is not applicable where a previous agreement exists; and, if there is a dispute as to whether such right exists, the Board is to decide. Section 232, therefore, does not apply to this case, as was contended at bar. This is not a contest between the claim of the city and the defendants to construct and operate a street railway, nor does the city dispute the existence of the agreements under which the defendants claim the right to build the railway; on the contrary, the Corporation of the City of Windsor has expressed its acquiescence by resolution and by-law as to the proposed acts of the defendants. The result is, that sec. 250 applies, and it was admitted that the defendants had not obtained the consent of the Board authorising the work to be done.

The Municipal Franchises Act, 2 Geo. V. ch. 42 (R.S.O. 1914, ch. 197), sec. 3 (1), provides that a franchise shall not be granted by the council of a municipality to use a street or high-

way without the assent of the electors. Section 4 (1) applies this provision to an extension of works already constructed; sec. 4 (2) declares that sub-sec. 1 shall not apply to any franchise granted by general or special Act before the 16th March, 1909, but no such franchise or right shall be renewed nor the term thereof extended by a municipal corporation except by by-law with the assent of the electors, as provided by sec. 3. I am of opinion that this last clause as to renewal is not retro-active. The defendants' right to use the streets in question for their railway rests upon the agreements of the 17th April, 1893, and the 4th July, 1893, as modified by the agreement of the 28th July, 1902, validated by 3 Edw. VII. ch. 112; and, that being a special Act prior to the 16th March, 1909, the last clause (2) of sec. 4 excludes the application of the section to the defendants' franchise.

It is not, therefore, in my opinion, under the peculiar circumstances of this case, compulsory upon the city corporation to submit the by-law authorising the construction of the railway on the streets in question for the approval of the electors; but the sanction of the Board is necessary. The latter not having been obtained, the acts of the defendants were without authority and illegal, and created a nuisance on the streets in question.

It also appears from the evidence that the plaintiff Dresch suffered peculiar damage by reason of the acts of the defendants upon the said streets, upon which his premises front. These acts rendered access to his house and lot difficult, if not impossible, and increased the cost of getting material there for his building operations.

I am also of opinion that the Corporation of the City of Windsor is not a necessary party to this action.

The by-law was properly passed authorising the railway to be built, but the sanction of the Board was necessary, and was not obtained. That was wholly a matter for the defendants. It is not a case where damages alone is a proper remedy.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

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[APPELLATE DIVISION.]

June 15.
Dec. 24.

RAYNOR V. TORONTO POWER CO.

Master and Servant—Injury to Servant—Negligence—Electric Current—Escape of Dangerous Element—Evidence—Onus—Findings of Fact of Trial Judge—Duty of Master to Provide Safe Place for Servant to Work in—Negligence of Fellow-servants—Workmen's Compensation for Injuries Act, R.S.O. 1914, ch. 46, secs. 3, 6—Cause of Injury—Defect in Appliances—Reasonable Precautions—Knowledge of Defect.

The plaintiff was employed by the defendants, under the direction of their officers, in painting a tower, on which were strung the defendants' transmission wires, conveying electricity; he came in contact with a wire charged with electricity, and was severely injured. The part of the tower, called a "unit," which he was painting, was supposed to be safe; the plaintiff had been assured that the electric current in that unit had been turned off and that the wires were dead. In an action for damages for the plaintiff's injuries, tried without a jury, the trial Judge found, upon the evidence, that the injuries were caused by electric current in the supposed dead unit, and not, as the defendants contended, by the plaintiff touching the live wire on the adjoining unit:—

Held (RIDDELL, J., dissenting), that the evidence was sufficient to justify the finding; and, the plaintiff having been sent to a dangerous place, the onus was upon the defendants to satisfy the Court that they were guilty of no negligence; and that they had failed to do.

The system adopted by the defendants did not afford a safe and proper place for the plaintiff to do his work, and the defendants were not relieved from responsibility by the fact that the operations were superintended by a competent foreman.

The principle of *Rylands v. Fletcher* (1868), L.R. 3 H.L. 330, applies to an electric current; and, having regard to the dangerous nature of the current, and the fact that the plaintiff was ordered to go to a place where, if he were not protected by the current being turned off from the wires about which he was to work, there was the greatest possible danger, the responsibility of the defendants to the plaintiff was not less than it would be to a person upon whose land the defendants had permitted the current to flow.

Review of the authorities.

Per RIDDELL, J.:—Had the conclusion of fact been drawn by a jury, it could not stand, as it was much more likely that the plaintiff and his witnesses were mistaken than that any current could be in the wires of the unit upon which the plaintiff was at work. But, assuming that the finding of the trial Judge should stand, if a current was allowed to run in at least one wire of the unit, that was not intended by the defendants, and it must have been the result of negligence or of some inexplicable accident. If of negligence, it must have been that of a fellow-servant, and no action would lie at the common law. If the Workmen's Compensation for Injuries Act, R.S.O. 1914, ch. 46, were appealed to, there was no evidence of the negligence of any person or persons entrusted by the defendants with the duty of seeing that the condition of the works, etc., was proper, and the defendants would not be liable under sec. 6 (a); sec. 3 (c) is not broad enough to cover the case of one in charge of an electric current—railway companies alone are aimed at by it; and, if any servant was negligent, it could not be said that his negligence was the cause of the plaintiff's injury. If the case was one of mere accident, the defendants were equally exonerated. The master does not warrant the safety of the servant's employment; he undertakes only that he will take all reasonable precautions to protect him against accidents. No further

or other precautions than those actually taken were suggested, and it was hard to conceive of a more absolute system of precaution. The common law duty of the master to provide a place reasonably safe for the servant in performing his duty is limited in the manner pointed out in *Bergklint v. Western Canada Power Co.* (1914), 50 S.C.R. 39, and previous decisions of the Supreme Court of Canada; and, having regard to the safety of the defendants' permanent structures and the character of the work, there was no breach of that duty. In order to establish a common law liability it is necessary to prove that the master knew and the servant did not know of the defect in the appliances. The fact that electricity was in question made no difference. *Citizens' Light and Power Co. v. Lepitre* (1898), 29 S.C.R. 1, and *Royal Electric Co. v. Hévê* (1902), 32 S.C.R. 462, answer the contention that the doctrine of *Rylands v. Fletcher* applies. Moreover, it was not proved that the electricity was the product or the property of the defendants; and in any case they had the legal right to have electricity in all of their wires, and were not responsible for its escape in the absence of negligence on their part.

Judgment of FALCONBRIDGE, C.J.K.B., affirmed; RIDDELL, J., dissenting.

ACTION for damages for injuries sustained by the plaintiff while working for the defendants, by reason of their negligence, as the plaintiff alleged.

The action was tried by FALCONBRIDGE, C.J.K.B., without a jury, at St. Catharines.

J. H. Campbell, for the plaintiff.

D. L. McCarthy, K.C., for the defendants.

June 15. FALCONBRIDGE, C.J.K.B.:—The plaintiff on the 6th September, 1913, received severe injuries while painting on a certain unit, being part of a tower, on which were strung the defendants' transmission wires, as the result of coming in contact with a wire charged with electricity. He had previously been assured that everything was safe, that is, that the electric current in that unit had been turned off and that the wires were dead.

The plaintiff swore positively that he did not touch any of the live wires on the adjoining unit. The evidence of the plaintiff as to where he was standing just before receiving the shock was corroborated by Hamilton, by the foreman Maudsley, and, I think, by Bull, a witness called by the defendants.

The direct testimony satisfies me that his injuries were caused by electric current on the supposed dead unit. The defendants' evidence is entirely of a negative character, from which I am asked to infer that the plaintiff was the author of his own

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wrong in touching the live wire on the adjoining unit. I prefer the positive evidence.

Judgment after 30 days for the plaintiff for \$1,200 and costs.

The defendants appealed from the judgment of FALCONBRIDGE, C.J.K.B.

October 14 and 15. The appeal was heard by MULOCK, C.J. Ex., CLUTE, RIDDELL, and LENNOX, JJ.

D. L. McCarthy, K.C., for the appellants, argued that there had not been sufficient evidence to establish negligence. The defendants had appointed a competent foreman; and, if he had been negligent, the defendant company could not be held liable for that: *Bergklint v. Western Canada Power Co.* (1914), 50 S.C.R. 39. The company's system was all that could be desired, and the escape of some electricity into a wire from a cause that could not be foreseen was not negligence: *Eastern and South African Telegraph Co. Limited v. Capetown Tramways Companies Limited*, [1902] A.C. 381; *Canadian Pacific R.W. Co. v. Roy*, [1902] A.C. 220; *National Telephone Co. v. Baker*, [1893] 2 Ch. 186; *Russell v. Bell Telephone Co.* (1908), 11 O.W.R. 808. The principle of *Rylands v. Fletcher* (1868), L.R. 3 H.L. 330, does not apply.

J. H. Campbell, for the plaintiff, respondent, contended that it had been the duty of the defendants to provide a safe place for their workmen to work in. This they had failed to do. They could not invoke the doctrine of common employment. They could not delegate to another, even a competent foreman, the duty of providing a safe place, so as to escape liability themselves: *Ainslie Mining and R.W. Co. v. McDougall* (1909), 42 S.C.R. 420. The defendants had not used the high degree of foresight, care, and skill, required of persons engaged in operations of so dangerous a nature: *Royal Electric Co. v. H  v  * (1902), 32 S.C.R. 462; *Citizens' Light and Power Co. v. Lepitre* (1898), 29 S.C.R. 1. Thus they were negligent.

McCarthy, in reply.

December 24. CLUTE, J.:—The plaintiff was employed by the defendants, under the direction of their officers, to paint cer-

tain of their towers, to which were attached wires conveying electricity, and he claims that he was informed by his foreman and the defendants' officers that the current of electricity had been shut off from the said wires, and he was directed to climb amongst the frame work of one of the towers and paint that part near to the wires; that he did as directed, and, after he had proceeded with some painting, the defendants suddenly and without warning to the plaintiff negligently caused the electric current to flow over the said wires, with which the plaintiff was obliged to be in contact to do the said painting, and thereby caused a heavy current of electricity to flow through the body of the plaintiff, and caused him to fall to a plank walk or platform 7 or 8 feet below where he was working, whereby parts of his body were burned by the electricity, and he was seriously injured. He further charges negligence on the part of the defendants in not providing a reasonably safe structure or works for the plaintiff lawfully engaged in his work, and that they negligently failed to provide any proper system of appliances for controlling the electric current in order to prevent unforeseen and extraordinary risks to the plaintiff while engaged in the said work.

The defendants deny that the plaintiff was informed by their officers that the current of electricity had been shut off or that he was directed to climb up the frame work as alleged. The defendants further deny that, without warning to the plaintiff, they caused the current to flow over the said wires, and charge that the injuries that the plaintiff suffered were caused by his own neglect and want of care, and further deny that they failed to provide a proper system for the control of the electrical current while the plaintiff was engaged in the work in question.

The case was tried by Chief Justice Sir Glenholme Falconbridge, and he finds as follows (setting out the findings of the learned Chief Justice, as above).

The notice of appeal asks that judgment be entered for the defendants, or for a new trial, upon the grounds: (1) that the judgment is not supported by the evidence; (2) that the evidence makes it clear that the wire upon which the plaintiff's paint pot was hanging was not alive at the time of the accident; (3) that

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there is no liability at common law, and there is no finding of negligence on the part of any employee or superintendent of the defendant company which would make them liable under the Workmen's Compensation for Injuries Act; (4) that there is positive evidence that there was no current turned on the line where the plaintiff was working; (5) that the trial Judge has not found how the current came to be on the wire, or what, if any, theory he accepts as to how the current got there.

The case resolves itself largely into a question of fact as to whether there is evidence to support the findings in the judgment of the trial Judge.

The accident occurred while the plaintiff was painting on a tower, east of the Welland Canal, by which the wires are carried over the canal. The tower carries four "units," each unit carrying three wires. The units A and B were on the north side of the tower. The central wire of each unit, which is called "wire 2" on the blue-print (exhibit 2), is 6 or 7 feet high. The other two wires of each unit are from 2 to 3 feet high. Wire number 1 on the south side of B unit is about 6 feet from wire number 3 on the north side of A unit, and in the centre between them is an iron post or spire carrying no wires and extending several feet above the highest part of the unit that carries the wire, so that a person working on number 3 wire of A unit would be separated from number 1 wire of B unit by this spire. These wires are, as stated, about 6 feet apart.

Maudsley was the plaintiff's foreman, and with the plaintiff was another painter, Robert Hamilton, who worked with the plaintiff.

Having received orders from Maudsley, Hamilton and the plaintiff and Maudsley went up to paint. The point where they were painting was about 135 feet from the ground. There was a platform about 7 or 8 feet below where the plaintiff was working at the time of the accident.

Maudsley having been informed that B unit was clear, the plaintiff and Hamilton painted that unit, came down, and, after again being informed that the wires on A unit were dead, meaning that there was no electricity passing through them, they ascended and commenced to paint about wire 3 on unit A; the

plaintiff standing next to wire 1 on unit B and separated therefrom by 6 feet with the spire above referred to between him and wire 1. I let each tell his own story.

The plaintiff says: "After we had received the orders from our foreman we got up there to paint around the insulators that carry these wires.

"Q. Who instructed you to paint the insulators that carried those wires A. Mr. Maudsley, our foreman.

"Q. What instructions were given you about painting these insulators? A. Mr. Maudsley told us to paint it—if I can state this way I would rather: Mr. Maudsley told us to get up on the plank platform ready to receive the signal from the linemen; he said, 'As soon as you receive the signal from the linemen, you can get up on to the top and start painting around the insulators.'

"Q. What was the signal for? A. It was to denote to us that everything was safe and that the current of electricity was shut off.

"Q. Were you told that? A. We were told that.

"Q. By whom? A. Both by Mr. Maudsley and by the two linemen (Creswicke and Smith.)

"Q. They were to give you word when the electricity on one particular unit had been turned off? A. Yes.

"Q. And the three wires on that particular unit on which you had to work would be dead? A. Yes.

"His Lordship: What signal were you to get; a word of mouth or sign?

"A. Both; when they turned the juice off they would say, 'All right, fellows,' wave their hand that way—'All right, fellows, everything is all right; go ahead and start'."

The other painter was Robert Hamilton.

"Q. With reference to this plan which shews the units, which one did you paint first? A. First of all we painted B.

"Q. Marked letter B on the plan, exhibit 2? A. Yes.

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“Q. After you had completed painting the insulators on B, what did you do next? A. We were told that that line would then be turned on so that the current would be running through B.

“Q. Who told you that? A. The lineman told us that.

“Q. After you painted B you got down and painted some of the cross pieces? A. Yes.

“Q. After painting B, 1 and 2, what did you do? A. We waited until we got the signal again, and then we went on and painted A.

“Q. What signal did you get before you went up to paint A? A. We got the same signal as before; the linemen climbed on the pole, grounded the wires, and then when they were ready gave us the signal by hand and by word of mouth.

“Q. These linemen were apparently in charge of the electricity at that point? A. Yes, sir.

“Q. And whereabouts were you working first when you went up there? A. I was standing near the wire shewn on that plan.

“Q. On which side of the insulator? A. On the side nearest unit B shewn on plan exhibit 2.

“Q. Where was Hamilton? A. Hamilton was on the opposite side, on the opposite side of the insulators.

“Q. Did you have a paint pot? A. We did.

“Q. Was the same paint pot used by both you and Hamilton? A. I consider it was, I am almost positive of that. . . . We hung our paint pot on one of the wires. . . . On wire 3.

“Q. Wire 2 is how much higher than wire 3? A. I should say at least 5 feet; I cannot bring that to mind how high they were, but I would say at least 5 feet.

“Q. In what position were you when you were painting? A. I was standing right near to wire 3.

“Q. Close to the insulator on wire 3? A. Yes.

“Q. How close to that insulator would you be? A. At times

touch it with my leg—of course the upright support which the insulator is on.

“Q. . . . The distance between wire number 3 on that unit and wire number 1 on unit B is six feet? A. Yes.

“Q. About how long did you paint in this unit? A. I should say about ten or fifteen minutes before I got my shock, that is, from the time I started till the time I got injured.

“Q. How did you come to put your paint pot on the wire? A. When we first started on the tower we had been told it was perfectly safe to do so by our foreman, Maudsley.

“Q. What was the accident, what happened to you? A. I was thrown from the point I was standing.

“Q. You became unconscious? A. I did.

“Q. What is the last thing you remember doing prior to your becoming unconscious? A. The last thing I remember doing was having my paint brush in my right hand in that manner.

“His Lordship: Very much as one would hold a pen? A. Very much the same, and I had placed it into the paint pot, and, as far as I remember, it was in extracting my hand from the paint pot that I was thrown.

“Mr. Campbell: That is the last thing you remember? A. Yes. I just remember getting that shock and just going back like that, and that is all I remember, just know I was thrown, I felt myself going, that is all. . . . When I returned to consciousness I was lying upon the plank-walk, about 6 or 8 feet below where I was standing.”

He then explains the injuries that he received; the thumb and index finger had to be amputated, and other fingers are of very little use, and he received other injuries from shock and burning. His feet were burned on the bottom, blisters appearing on two or three different parts of the bottom of the foot; his toes were burned across the top; the large toe of each foot being burned more severely than any other parts of the foot.

On cross-examination he states that while they were painting unit B, power was still on unit A, and they were careful not to come in contact with any of the wires of unit A. After painting

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unit B, they did not go back to paint on the wires for some time, because the power was still on unit A. He states that he remembers the linemen catching hold of the wires to shew that they were dead, but not at that time; indicating that it was before they started at unit B, which was confirmed by Maudsley. He further states that when he went up to paint on unit A it was between half past 4 and 5, "nearer to 5 I should say." He also says, "Hamilton says to me you do one side of the insulators, and I will do the other." This is important, as it indicates the position of the two at the time of the accident; it was confirmed by Maudsley. He states that after the accident for some time his memory was very bad, but it is improving.

Robert Hamilton, who was working with the plaintiff, confirms what the plaintiff said as to where they were working, namely, on wire number 3 of unit A.

"Q. Where was Raynor? A. Raynor was on the same insulator on the right of me.

"Q. What do you mean by the right, alongside? A. Right shoulder to shoulder, our heads were practically touching one another.

"His Lordship: Which side of that wire 3 were you on? A. On the left side of it.

"Mr. Campbell: You were very close to him? A. Practically touching one another, because we were just on the bottom of the insulator together.

"Q. What did you have to stand on? A. Just a small plate of iron there was at the side of the tower.

"Q. How large would that plate of iron be? A. I should say just a little more room than would cover your feet.

"Q. How long had you been working on this particular insulator? A. I suppose about 15 minutes.

"Q. Did you see what happened to Raynor? A. We were painting away there and talking; I was painting away, and the first thing I knew, we had not been there more than about 15 minutes, and there was a flash and a report and Raynor fell down, and I jumped down after him.

“Q. Where was that flash? A. It kind of shot past me.

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“Q. Just at that moment, prior to the flash, can you tell the Court where Raynor was, how close to you? A. We were practically touching (one) another, because there was only just the wire on that side of the insulator that parted us.

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“Q. Just the wire between you? A. Yes.

“Q. Was Raynor anywheres near the wire number 1. . . . With reference to wire number 1 in unit B? A. That would be in the other set, he was not anywhere near it because he was right down the side of me.

“Q. In what position would you and Raynor paint, what attitude? A. We were half crouching really, just like that.

“His Lordship: How high had he painted from the ground? You started from the ground to paint upward? A. When I first started on there, we gradually did the bottom part, me and Mr. Maudsley, and he said he would wait until he got men, and the men come, and we had been doing quite a bit going down, and Creswicke came and told us what time he would cut the power off, and he told us to wait and he would let us know, and Mr. Maudsley told us to go up, and we went up and stood on the platform and waited for orders before we went up and started the insulators.

“Q. And then on this Saturday, that is the day of the accident, who instructed you as to what work was to be done? A. Mr. Maudsley.

“Q. Who was he? A. He was the foreman.

“Q. Who gave instructions to you and Raynor to get up and paint the insulators? A. Well, we were on the platform, and I was watching Creswicke, and he climbed the tower and put the ground wires on, and he shouted out ‘All right,’ and when he said ‘All right’ I said to Mr. Maudsley, I told Maudsley, I was scared to go up even though it was grounded. I said, ‘I will go anywhere but among those wires,’ because I was afraid of them, and Creswicke touched the wire and he said it was perfectly safe, and I said ‘All right, I will go up.’ And, when Cres-

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wicke told us that, I climbed up and started to work; we were told it was perfectly safe. . . .

“Q. How often did you see him do that? A. I only mind seeing him touch it once.

“Q. That was with reference to this unit? A. Yes, that is the one where the accident was on.”

Later on, on cross-examination he says: “He took hold of the wire.

“Q. The one you were working on? A. I do not know whether it was the one we were working on, but he touched one wire.”

Walter Maudsley, in the employ of the defendants as foreman painter, says that the plaintiff was working under him on the occasion of the accident.

“Q. Where was he working at the time he sustained this accident? A. Up on the tower around this—have you the plan?

“Q. Yes? A. He was in here, there was a little spire goes up here, *between the live wire and dead wire, he was working on here.*

“Q. A little spire? A. A little conductor or something goes right up here.

“His Lordship: To the right of where he was working? A. Yes. . . . It must go up 10 or 12 feet?”

Then he says: “There it is on that other plan, exhibit 1.”

“Q. That spire is between wire number 3 in unit A and wire number 1 in unit B—you saw the accident? A. I saw him a moment before he was struck, but not actually at the moment he was struck.

“Q. Where was he when you saw him last? A. Standing right about there.

“His Lordship: Just immediately to the right?

“Mr. Campbell: How far from the insulator would he be at that time? A. His body about a foot or a foot and half, I suppose.

“Q. What position was he? A. The last I saw him he was painting around here, but he made some movement; if I may say,

I had the impression of getting another dip of paint; he made some slight movement, he was standing there, and I had occasion to look somewhere else; I had other men there; and the next thing I heard was a slight noise beyond and I saw the flash all round."

The witness was on the platform 6 or 8 feet below.

"Q. What I understand you to mean is this—you saw him making a movement as if he were going to get another dip of paint? A. That was the impression I had; I could not swear to that, as if he was going to get another dip of paint.

"Q. Out of the paint pot ? A. Yes.

"Q. And at that instant there was an accident? A. Yes, there was a slight noise, and I looked at once and saw him while he was standing up there before he fell down.

"His Lordship: You did say something about a flash? A. Yes, a flash and a slight noise.

"Q. Where was that flash? A. You could hardly say—it happened that quickly; it was around his hand; as far as my impression goes, he had his hand something like that (arm bent at elbow), and it was around that.

"Q. The flash you saw was around Raynor's hand? A. Yes, it seemed to be, as far as I know anything.

"Q. And you say you saw him standing there momentarily? A. Yes.

"Q. How long did he stand? A. It seemed a long time to me in the tension of the moment, seeing such a dreadful thing happening it seemed a long time, but of course it could not have been very long, it must have been a very short time.

"Q. What happened to Raynor? A. He seemed to lose control of himself and fall right down.

"Q. When you saw the flash at Raynor's hand, did you know what had happened? A. Yes, I could see he had got a shock.

"Q. A shock of what? A. Electricity—I saw the flash.

"Q. How did Raynor fall? A. He seemed to go a kind of this way, and turned right around and went head first.

"Q. A side movement? A. And head first, and then he seemed to fall right over.

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“Q. Where did he fall? A. On to the platform, on to a little plank, the edge was sticking up a little, and his head came in contact with that—about 7 feet I should say.

“Q. What was done? A. He was wiggling around in great pain, and I tried to keep him from rolling off, you see, and I held him there and called on the others to come and help me with him.”

The witness further states that he was in charge of this gang, but had no control whatever of the electricity. He says the company sent down linemen to fix that. He had orders from the engineer not to do anything until they gave him the clearance. He says: “I am not supposed to have any knowledge of electricity. I understood that the electricity was to be cut off, and they would ground them properly.”

“Q. How far was Raynor from the live wire in unit B at the time you saw the flash? A. As far as I could state, he would be about $4\frac{1}{2}$ feet—he must have been.

“Q. Could he have got much closer to this wire number 3 of unit A than he was? A. No, not and had freedom to work.

“Q. He was working as close to number 3 as he could? A. Yes.”

On cross-examination, referring to Creswicke, the lineman, he was asked:—

“Q. Do you remember him catching hold of the three wires to shew you they were all right? A. No, not on that set, but on the other set.

“Q. You did not go up yourself with the men? A. Yes, I did, not on that particular set, but the first set I did, to give them confidence.

“His Lordship: Were you standing on the wooden platform when he fell? A. Yes.

“Q. Do you know what time it was that the accident happened? A. It was just after 5.

“Q. How do you fix that? A. When we went up there it was very close to 5 o'clock.

“Q. You had been there 10 or 15 minutes before this accident happened? A. Yes.

“Q. So that it was just after 5 when the accident happened? A. Yes, I am sure of that.

“Q. Had you seen them working on that spire? A. Not after they got up to do this side; they had done that half on that side while these were shut off.

“Q. You had not seen them do the half on this side? A. No.

“Q. Do you know whether they did it or not? A. Yes; I think Raynor got up and did the upper part of that spire; I would not swear to it, but I rather think so.”

The witness states that the noise he heard just before the flash was “just a little swish.”

“Q. Then a flash? A. Yes.

“Q. Then you looked up? A. Yes.

“Q. Was the flash over when you looked up? A. It had evidently only begun.

“Q. It was around his hand? A. Yes.”

George Bull, who was called for the defence, was also a painter for the defendants at the time of the accident. He was painting on the tower on the west side of the Welland Canal. This was a high tower similar to the one on which the plaintiff was painting on the east side. He says he was working on the inside wire that was supposed to be dead; had probably been working 10 or 15 minutes or a half an hour, 10 minutes anyway; he says: “I heard a sizzle on the wire and turned round immediately and saw Raynor fall.”

“Q. Can you tell from what wire the sizzle came A. From my estimation it came right from the wire alongside of what I was working. Raynor was in the position falling from that wire.”

On cross-examination:—

“Q. That sizzle came, to the best of your knowledge, over the wire which is marked here number 3? A. I had my back towards it, and I heard the sizzle, and turned around and jumped. I thought it was from that wire, and that is the reason I jumped down below so that I would not endanger myself.

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“Q. Which side of this thing that runs up the centre? A. The inside between there.

“Q. He was closer to wire number 3? A. Of course he was in between this column here, what I understand column or spire, whatever you call it, between that and that.

“Q. He was in between the two? A. Yes.

“Q. He was closer to wire number 3? A. Yes, as nearly as I could tell you.”

The evidence of these four witnesses is that upon which the learned trial Judge relied in finding for the plaintiff. The evidence of the foreman, confirmed as it is by that of the other witnesses, is very strong to shew that the accident occurred while the plaintiff was as close to number 3 as he could be and properly do his work, facing wire number 3, as foreman Maudsley saw him at the moment when the flash was playing about his hand. His elbow was bent, which would bring his hand in towards number 3, and not in the direction of unit B, from which he was also separated by the spire.

The evidence of the defendants' witnesses tends to shew that the precautions taken by the defendants to ensure the line upon which workmen were working being dead were these. The power was cut off at Niagara at its source, and in order to prevent induced current, called “static” by the witnesses, passing from a live wire to a dead wire, the wires were grounded by the linemen on each side of the plaintiff and other workmen who were doing painting upon the towers.

At the time in question, the witness Charles Cole had charge of the transmission line. He states that he received a clearance from the operator at Niagara Falls, to see that the line was dead, and to give it to the men that work on the line. This witness states, and his records shew, that the clearance given was for Martin to change the wires off the old on to the new tower at the transformer. “I could not tell exactly what it is, but all they told me they were changing their wires.”

The witness Seiler, who is in charge at the Falls, in his record has an entry:—

“4.55 p.m. Disconnecting switches opened in line A and line A out of service for Cole.

"4.56 p.m. Cole reports line A marked out of service for Mr. Martin, changing over line A from old tower to new tower."

Seiler was foreman at the transmission house at Niagara. It appears from the evidence that grounding after the current has been turned off is to prevent the static or induced current from injuring the men. He states that severe injury may be given in that way, but no burning. He states that the power was marked out of service for Martin. At 7.35 he reports to Cole: "Martin all through with line A and ground wire taken off." He was asked: "Q. The only power that can get on to that line is from your end of the system? A. No; you can make that line alive from some other source; at my end of it it is the only place you can make the line alive, and it might happen that is the only place I could make it alive."

The evidence was not at all clear as to other means of making the dead wire alive, aside from turning it on at Niagara, and from induction.

This witness speaks of a noise about the time of the accident: "Q. During the time that the power was off A, were there any indications at your station of a grounding on any of the wires on B? A. There was a very peculiar thing; we did not know at the time what caused it or did not know until a long time afterwards what caused it; in fact we had nothing on our log book to shew what caused the ground, as any reports from the line would come direct to the power house, and if they saw this they would tell us, and they would tell us if the trouble is still on; but at 5.10 in the station there was a sizzling on the busses like running water, which always takes place when one wire drops to the ground."

The sizzling at 5.10 indicated grounding on the 60,000 volt between Niagara Falls and Toronto. He describes "static" as simply an induced current or electrical effect from a live wire to a dead line where they run parallel, and line B being in service, one line in and one line out, there would be a certain amount of static on the dead line, "and it makes it absolutely necessary and essential to ground the line when you work on it to take off that static." The witness states that he has received many "bumps" from this cause. In his case it has always been at

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the station at the end of the line: "It was severe, but it never burnt me, I never had any burns from static."

"Q. Is it possible for him to receive a shock if the wires are not properly grounded? A. Yes, a static shock."

Asked as to their method of grounding, he said that he thought those used by the men were very adequate indeed.

"Q. Do you know of any better? A. No, we have tried to get better ones, but we could not.

"Q. Are they standard appliances? A. No, not necessarily. They are practically made by some of the men themselves, that is, got out the ideas, and we have tried to always listen to them, tried to get something better; what we have is the very best thing we have got for the job."

It would appear from the evidence of this witness that the company were not wholly satisfied with the manner of grounding, as they tried to get a better method, but following the practice of the men was the best they could do, and he thought that it was adequate. He further states that a person would have to come within 3 inches of wires carrying 60,000 volts to get any effect. He does not think it possible that a person standing further off than that could get a shock, and the tendency would be to repel him.

The witness Paul Ackerman, called as an expert for the defence, speaking of the static force where a wire is not grounded, says: "About the static on a dead wire, where we would not have any ground whatever, just the insulated wire, we could reach the same voltage.

"Q. What voltage would you reach? A. We could come up to possibly 60,000 volts or higher.

"Q. Do you mean to say a dead wire, insulated, with no current on it whatever, that the friction of the wind would in time give a voltage there of 60,000? A. That is theoretically possible under certain air conditions, very dry days, mostly we get at the same time leakage of the insulators which comes almost to a balance, which can be any place below 60,000 volts, I cannot tell that, that depends entirely on air conditions and local conditions.

“Q. And you can get that without current being put on the wire at all? A. You can get that without any current, but absolutely insulated wires.

“Q. What is the other static from? A. The other static is an effect from parallel lines with some current; and it is directly dependent upon the current in the other wire; the higher the current, the heavier the current, the higher the voltage you may get.”

Asked if he was able to account for the shock which the plaintiff got, if he only came in contact with those dead lines, he said: “I feel absolutely sure that he would not have gotten those injuries he got from that dead line, even assuming that not a single one ground would have been on that line. He could have gotten a shock but not the injuries he received, and no burns.” His evidence is not very illuminating.

Upon the whole, I think that the evidence of the four witnesses referred to was quite sufficient to justify the finding that the plaintiff was injured from a current from what is called unit A (wire 3), a wire supposed to be dead. I think I should have reached the same conclusion.

That being so, there was evidence of negligence on the part of the defendants in sending the plaintiff to a dangerous place, and the onus was upon the defence, in my opinion, at that stage of the case, to satisfy the trial Judge that the defendants were guilty of no negligence. This they failed to do.

It was said by Lord Macnaghten in *McArthur v. Dominion Cartridge Co.*, [1905] A.C. 72, 75, that it is not the province of the Court to retry the question. “The Court is not a Court of review for that purpose. The verdict must stand if it is one which the jury as reasonable men, having regard to the evidence before them, might have found, even though a different result would have been more satisfactory in the opinion of the trial Judge and the Court of Appeal.”

I think that applies with equal force to a case tried by a Judge.

“When a finding of fact rests upon the result of oral evidence it is in its weight hardly distinguishable from the verdict of a jury, except that a jury gives no reasons. The former practice

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of Courts of Equity arose from the fact that decisions often rested upon evidence on paper, of which an appellate Court can judge as well as a Court of first instance:" *Lodge Holes Colliery Co. v. Mayor, etc., of Wednesbury*, [1908] A.C. 323, 326. In that case the judgment of the trial Judge was restored, against the view taken by the Court of Appeal, expressly upon the ground that the findings of the trial Judge were conclusive upon the questions of fact.

It never was intended that the plaintiff should undertake the risk of working near live wires; and if, from any cause, the wire became alive without default on the part of the plaintiff, that was not a risk which he assumed.

It is the duty of the master to keep the plant in a condition in which, from the terms of the contract or the nature of the employment, the servant has the right to expect it will be kept: *Clarke v. Holmes* (1862), 7 H. & N. 937 (Ex. Ch.); Halsbury's Laws of England, vol. 20, para. 255; and the extent of the master's duty varies according to the degree of danger involved in the work, and also according to the skill and experience possessed by the servants: *ib.*, para. 256.

For some reason which the defendants did not give, they did not provide the plaintiff with a safe and proper place to do his work, as they should have done, and, having shewn that his injuries were caused by a dangerous element under the control of the defendants at a time and place where such element ought not to have been with its destructive power, the plaintiff is, in my opinion, entitled to recover. In other words, he made out a *primâ facie* case of negligence which the defendants have not answered: *Ainslie Mining and R.W. Co. v. McDougall*, 42 S.C.R. 420. The system adopted by the defendants did not, in fact, afford a safe and proper place for the plaintiff to do his work, and the defendants are not relieved from responsibility by the fact that the operations were superintended by a competent foreman: *Brooks Scanlon O'Brien Co. v. Fakkema* (1911), 44 S.C.R. 412.

It was urged on the part of the plaintiff that, electricity being in its nature a highly dangerous element when not under efficient control, a very high degree of care and precaution was necessary

on the part of those who were responsible for its creation and use, and that the principle in *Rylands v. Fletcher*, L.R. 3 H.L. 330, applied; for, although in this case it was not by reason of the electricity escaping from the lines and passing into a neighbouring property that the injury was caused, yet the injury was caused by reason of the fluid entering a wire where at the time it ought not to have been permitted, having regard to the work and duty assigned to the plaintiff. It is pointed out by the Lord Chancellor (Lord Cairns) in that case (pp. 338, 339), as a principle of law, that an owner or occupier of a close may lawfully use it for any purpose for which it might in the ordinary course of the enjoyment of land be used. On the other hand, if, not stopping at the natural user, the owner desires to use it for any purpose which may be deemed non-natural, for the purpose of introducing into the close that which in its natural condition was not in or upon it, and if, in consequence of so doing, or in consequence of any imperfection in the mode of their doing so, the water so introduced escaped and passed off into the close of the defendant, then that which was being done was at the peril of the party doing it, and if injury was caused thereby the person permitting it would be liable; and (pp. 339, 340) reference is made with approval to the principle as laid down by Mr. Justice Blackburn in the Exchequer Chamber as follows: "We think that the true rule of law is, that the person who, for his own purposes, brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril; and, if he does not do so, is *primâ facie* answerable for all the damage which is the natural consequence of its escape. He can excuse himself by shewing that the escape was owing to the plaintiff's default; or, perhaps, that the escape was the consequence of *vis major*, or the act of God.' "

Lord Cranworth states the rule of law as follows (p. 340): "If a person brings, or accumulates, on his land anything which, if it should escape, may cause damage to his neighbour, he does so at his peril. If it does escape, and cause damage, he is responsible, however careful he may have been, and whatever precautions he may have taken to prevent the damage."

In *National Telephone Co. v. Baker*, [1893] 2 Ch. 186. Keke-

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wich, J., after full argument by eminent counsel, held that the principle of *Rylands v. Fletcher* applied to an electric current.

The question was again considered in *Eastern and South African Telegraph Co. Limited v. Capetown Tramways Companies Limited*, [1902] A.C. 381. In this case the judgment of the Privy Council was delivered by Lord Robertson, who said (p. 391): "Now, if regard be had solely to the action of the respondents in storing electricity on their lands, it must be allowed that the analogy is very close to the illustrations given in *Rylands v. Fletcher* of the kind of things which a proprietor can only do at his own peril. Electricity (in the quantity which we are now dealing with) is capable when uncontrolled of producing injury to life and limb and to property; and in the present instance it was artificially generated in such quantity, and it escaped from the respondents' premises and control. So far as the respondents are concerned, it appears to their Lordships that, given resulting injury such as is postulated in *Rylands v. Fletcher*, and the principle would apply." Lord Robertson then points out that in the case before him neither person nor property was injured: "Certainly there is here no injury of the same genus or species with the tangible and sensible injuries which have hitherto founded liability on the principle in question, and which have always constituted some interference with the ordinary use of property." And it was there held, in regard to that section of the tramway which had been constructed under statutory authority, that *Rylands v. Fletcher* did not apply, because the disturbance can only occur when the cable is constructed without certain precautions which the evidence shewed had subsequently secured its immunity. It was also there held, in regard to those sections of the tramway which had been constructed under certain statutes, that the escape of electricity, being a natural incident of the operations legalised thereby, and not resulting from a leak, within the meaning of the statutory undertaking or condition, did not impose liability on the respondents. See also *Young v. Town of Gravenhurst* (1910-11), 22 O.L.R. 291, at p. 302, affirmed 24 O.L.R. 467.

In *Cairns v. Canada Refining and Smelting Co.* (1914), 6 O.W.N. 562, it was held by this Court that the principle in

Rylands v. Fletcher applies to a case where, in smelting ore, noxious gases were given off, which seriously affected the health of the plaintiff and other occupants of his lands, and injured his property.

In *Royal Electric Co. v. Hévé*, 32 S.C.R. 462, it was held that the defendants were liable for actionable negligence, as they had failed to exercise the high degree of skill, care, and oversight required of persons engaging in operations of a dangerous character.

In *Citizens' Light and Power Co. v. Lepitre*, 29 S.C.R. 1, the principle was recognised and applied that persons dealing with dangerous things should be obliged to take the utmost care to prevent injuries being caused through their use, by adopting all known devices to that end.

Having regard to the dangerous nature of the electric current, and the fact that the plaintiff was ordered to go to a place where, if he were not protected by the current being turned off from the wires about which he was to work, there was the greatest possible danger, it appears to me that the responsibility of the defendants is not less in their duty toward the plaintiff than it would be toward a person upon whose land the defendants had permitted the electric current to flow and injury was caused thereby.

In my opinion, the appeal should be dismissed with costs.

MULOCK, C.J.Ex., and LENNOX, J., concurred.

RIDDELL, J.:—An appeal from the judgment of the Chief Justice of the King's Bench whereby the plaintiff was awarded \$1,200 damages and costs.

The plaintiff, a young man of twenty, was in the employ of the defendants as a painter. On Saturday the 6th September, 1913, he was put to work by Maudsley, a foreman, at painting a tower, in the township of Stamford. On this tower (ignoring unimportant matters) there were two "units," A and B, each with three wires. There were also cross-pieces, apparently a little wider than the human foot—say 4 or 5 inches—upon which to stand. Both Maudsley and the two linemen, Creswicke and Smith, had informed the plaintiff that the current was off

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unit A, and that the wires of that unit were consequently "dead." After painting for about 15 minutes, the plaintiff received a shock of electricity without negligence on his part, and, as the learned Chief Justice finds, from one of the wires of unit A. He fell a distance of about 8 feet, and was injured by shock and fall to such an extent that \$1,200 is not an unreasonably large amount to allow.

The learned trial Judge does not state specifically upon what ground he renders a verdict for the plaintiff, and we must examine the facts to see if the verdict can be allowed to stand upon any ground.

On the argument no complaint was made of the system of the defendants, and it seems to be unexceptionable.

One Cole, a foreman, is stationed at Burlington, in charge of the lines, and he has full control of all the clearances, so that there will be no misunderstandings or clashing of authority. Whenever it is desired for any reason that a particular line should be deprived of electricity and rendered dead, Cole is asked for a clearance, i.e., to get the line out of service. Cole gives instructions, and the foreman in charge of the transformer at Niagara Falls cuts off the power from that line and notifies those concerned.

Upon the day in question, Seiler, the foreman at Niagara Falls, was informed that one Martin, an employee of the defendants, wanted to change the wires on unit A. He called up Cole at 4.56 and asked for a clearance, received permission, and at 4.57 he grounded the wires inside the station. At 4.58 he put on ground wires outside the station, which was an additional safeguard. Thereupon 18 or 20 men went to work to change the wires on unit A, apparently without casualty. The current remained off till 7.39. At 5.10 there was a peculiar sizzling on the "busses," indicating a ground on the B unit somewhere between Niagara Falls and Toronto. There seems to be no reason to doubt that the witnesses believed that these occurrences actually took place. Entries were made in the usual way in the record book for such purposes, and no discredit is cast upon the witnesses.

Cole, upon being informed that the line was clear, told Cres-

wicke and Smith, and they proceeded to "put the grounds" on unit A; that is, they grounded the wires in unit A on each side of the tower on which the painters were to work. Creswicke then "gave a clearance" to Maudsley, that is, he informed Maudsley that unit A was dead. Thereupon Maudsley told the plaintiff to go on the tower and paint. This was about 4.55, and the plaintiff painted about 15 minutes, when he received the shock, about 5.10.

It is extremely difficult to account for the accident. Were there nothing but the bare bones of the evidence which are laid before us, the conclusion would, I think, be, that the unfortunate man came in contact with one of the wires on unit B. There was a ground otherwise unaccounted for at the time in unit B, on which the current was undoubtedly active. A little carelessness on the part of the plaintiff would cause him to fall, and perhaps in the instinctive attempt to save himself unintentionally to come in contact with the B wires, and the apparently insignificant circumstance of the spot of paint on one of these wires would be accounted for.

I am glad to be able to chronicle the fact that there is no imputation cast upon any of the witnesses on either side by either side; and no reason appears from the notes why any should be at all charged with wilful misrepresentation. I can find nothing to indicate that any witness did not tell the exact truth as he saw and remembered it.

But there is more than his honesty which must be considered in weighing the evidence of any witness. The means of knowledge or opportunity for observation, the accuracy and retentiveness of the memory, the capacity to reproduce the former impression, the ability to clothe in appropriate words the mental concept, all are of importance. Of the means of knowledge, the opportunity for observation, we can judge from the notes of evidence; the honesty is not attacked, but the memory and powers of the mind we cannot determine. The trial Judge is in much better position than we; he sees the witnesses, and, a trained observer, he can appreciate much better the value of the testimony.

He has found as a fact that the "injuries were caused by electric current on the supposed dead unit."

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Even with this finding, I cannot persuade myself that that was the source of the current. The law says that on the trial of a case by a Judge, "where a finding of fact rests upon the result of oral evidence, it is in its weight hardly distinguishable from the verdict of a jury, except that a jury gives no reasons:" *Lodge Holes Colliery Co. v. Mayor, etc., of Wednesbury*, [1908] A.C. 323, at p. 326, *per* Lord Loreburn, L.C.; *Bishop v. Bishop* (1907), 10 O.W.R. 177; *Beal v. Michigan Central R.R. Co.* (1909), 19 O.L.R. 502, at p. 506.

Had the conclusion of fact been drawn by a jury, I think it could not stand, as it is much more likely that the plaintiff and his witnesses were mistaken than that any current could possibly be in the wires of unit A.

If that finding of fact is allowed to stand—and it may be that that is the right course—it will follow that, for some time, probably very short, instantaneous, a current was allowed to run in at least one wire of unit A.

This was not intended by the defendants; and, if it occurred, it must have been the result of negligence or of some inexplicable accident. If of negligence, the negligence must have been that of a fellow-servant, and consequently no action would lie at the common law: *Priestley v. Fowler* (1837), 3 M. & W. 1.

If the Workmen's Compensation for Injuries Act is appealed to, we must examine its provisions in view of the facts. Maudsley is an employee for whose negligence the company would be responsible under R.S.O. 1914, ch. 146, sec. 3 (b), (c), but there is no pretence that Maudsley was negligent; he got the word from Creswicke, and acted accordingly. There is no evidence, in any event, of his negligence or of that of Creswicke, Smith, Cole, or Seiler; so that, even if these persons, or any or one of them, should be considered as the person or persons entrusted by the defendants with the duty of seeing that the condition of the works, etc., was proper, the defendants would not be liable under R.S.O. 1914, ch. 146, sec. 6 (a). And sec. 3 (e) is not broad enough to cover the case of one in charge of an electric current. Curiously enough, railway companies alone are aimed at by the sub-section, although the provisions might well have been made broader. It is, moreover, hard to see how, any of these being negligent, the accident could thereby arise.

Cole could not himself change the current into unit A; he must instruct Seiler to do so; and it would be Seiler's hand which would move the switch and remove the ground from the outside of the transformer building. It is impossible to imagine that he would do so, knowing, as he did, that a number of men, 18 or 20, were changing the wires on unit A. He must needs have had murder in his heart to do anything of the kind, and we cannot presume a crime. But, if he did, his act would be perfectly innocuous unless the ground between Niagara Falls and the tower on which the plaintiff was working was also removed or was inefficient; and there is no evidence upon which we could find either alternative.

Then Creswicke and Smith, however negligent or malevolent they might be, could do no harm unless Seiler was working in concert with them—in other words, we must find a conspiracy between Seiler and Creswicke and (or) Smith before we can find that the casualty was due to the act of the servants of the company. We cannot do that without evidence—of which there is none.

If the case is one of mere accident—as it must be, the finding standing—of course the defendants are equally exonerated unless under some other head of responsibility. The common law duty of a master is to provide his servant with reasonable appliances for his work. But this is to be taken reasonably. "The master does not warrant the safety of the servant's employment; he undertakes only that he will take all reasonable precautions to protect him against accidents:" Halsbury's Laws of England, vol. 20, p. 120, and cases cited in note (h). He "is liable for accidents occasioned by his neglect towards those whom he employs:" *Brydon v. Stewart* (1855), 2 Macq. H.L. 30, at p. 35, *per* Lord Cranworth, L.C. "The master is bound to take all reasonable precautions for the safety of his workmen, and is liable for accidents occasioned by his neglect towards those whom he employs:" *Fowler v. Lock* (1872), L.R. 7 C.P. 272, at p. 280; Labatt on Master and Servant, vol. 3, para. 917 *sqq.*

No further or other precautions than those actually taken are suggested, and it is hard to conceive of a more absolute system of precaution.

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Then it is said that it is the common law duty of the master to provide a place reasonably safe for the servant in performing his duty. No one can dispute this doctrine, however it may be formulated—the different forms of expression are set out in Mr. Labatt's valuable work, in vol. 3, pp. 2438, 2439, note 7.

The Supreme Court of Canada have in a very recent case pointed out the limits to this doctrine. In *Bergklint v. Western Canada Power Co.*, 50 S.C.R. 39, the Court held that this applied to a permanent or quasi-permanent structure. Anglin, J., says (p. 67): "What will amount to such permanency as will impose on the employer the absolute duty of providing his servants with a place in which to work as safe as is reasonably consistent with the character of the work . . . and will not permit of his delegating to a superintendent . . . the selection and determination of the means of protection best adapted . . . so that the employer may be himself exempt at common law from liability for mistakes or negligence of such superintendent . . . must frequently be a question of degree" . . . And (p. 68): "The fact that the protection alleged to be defective or lacking is required for a temporary purpose is a material element in determining the liability of the defendants." *Wilson v. Merry* (1868), L.R. 1 H.L. Sc. 326, at pp. 342, 344, and *Hicks v. Smith's Falls Electric Power Co.* (1913), 5 O.W.N. 301, are referred to. The judgment of Mr. Justice Duff is also most illuminating, and the cases he cites are most convincing. The previous cases of *Ainslie Mining and R.W. Co. v. McDougall*, 42 S.C.R. 420; *Canada Woollen Mills Limited v. Traplin* (1904), 35 S.C.R. 424, and *Brooks Scanlon O'Brien Co. v. Fakkema*, 44 S.C.R. 412, are all discussed in this case. We had much the same point before us in *Lear v. Canadian Westinghouse Co.* (1914), 5 O.W.N. 769.

There is no pretence that the permanent structures were not all that could be asked for; no form or manner of improvement is even suggested, and I am unable to see that any liability attaches on the company under the principle now under discussion.

It will not be wholly irrelevant to mention the class of cases which hold that to establish a common law liability it is necessary to prove that the master knew and the servant did not know

of the defect in the appliances: *Rudd v. Bell* (1887), 13 O.R. 47; *Williams v. Clough* (1858), 3 H. & N. 258; *Roberts v. Smith* (1851), 2 H. & N. 213; *Fowler v. Lock*, L.R. 7 C.P. 272, at p. 286; *Griffiths v. London and St. Katharine Docks Co.* (1884), 13 Q.B.D. 259, 261.

It remains to consider whether the fact that electricity is in question makes any difference. I think not.

In *Citizens' Light and Power Co. v. Lepitre*, 29 S.C.R. 1, it was decided that persons dealing with dangerous material must use the utmost care to prevent injury, and "where there is evidence that there was a precaution which might have been taken by a company making use of electrical currents to prevent live wires causing accidents, and that this precaution was not adopted, the company must be held responsible for damages." That this evidence was given, and that it formed the basis of the decision, is plain from the judgments of the Chief Justice Sir Henry Strong at p. 5, and Mr. Justice Girouard at the same page.

So, too, in *Royal Electric Co. v. H  v  *, 32 S.C.R. 462, the appellants had negligently left a dead wire in a dangerous proximity to their own lines for two years, "an act of gross . . . criminal carelessness on their part" (p. 467); their "secondary wire was allowed to remain in a defective condition for many months immediately preceding the time the injury complained of was sustained, and it was at that time insufficiently insulated at a point in close proximity to the guy-wire" (head-note). It was properly held that the defendants had not exercised the high degree of care and skill they should have exercised. Davies, J., points out that the company is not an insurer and cannot be held liable as such. "Before they can be held liable, there must be shewn to have been the absence of some one of these necessary precautions, or of the required skill and vigilance; in other words, some negligence to which the accident can be reasonably attributed must be found" (p. 470). The learned Judge then proceeds to set out the negligence which has been proved in the case.

These cases answer any proposition that the doctrine of *Rylands v. Fletcher* applies. Moreover, it is not proved that the electricity was the product or the property of the defendants;

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and in any case they had the legal right to have electricity in all of their wires, and are not responsible for its escape in the absence of negligence on their part. Once the plaintiff touched the live wire, escape was impossible. *Lex non cogit ad impossibilia*. Cases of continued seepage into adjoining land have no application.

In view of the decisions of the Supreme Court, I cannot see how any liability can attach without negligence.

I think the appeal should be allowed, with costs here and below, if asked.

I may add that I should be gratified if the company should pay the plaintiff some reasonable sum, in view of the very serious injuries he has sustained.

Appeal dismissed; RIDDELL, J., dissenting.

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[MIDDLETON. J.]

MARTIN v. SHAPIRO.

Chattel Mortgage—Affidavit of Execution—Omission of Date—Bills of Sale and Chattel Mortgage Act, R.S.O. 1914, ch. 135, sec. 5.

Where the affidavit of execution of a chattel mortgage does not state the day of the month upon which the mortgage was executed, as required by sec. 5 of the Bills of Sale and Chattel Mortgage Act, R.S.O. 1914, ch. 135, the mortgage is invalid as against the assignee for the benefit of the creditors of the mortgagor.

Cole v. Racine (1913), 4 O.W.N. 1327, and *Parsons v. Brand* (1890), 25 Q.B.D. 110, followed.

CASE stated by the parties upon a question arising in the action as to the validity of a chattel mortgage.

December 21. The case was heard by MIDDLETON, J., in the Weekly Court at Toronto.

A. C. McMaster, for the plaintiff.

W. J. McWhinney, K.C., for the defendant.

December 24. MIDDLETON, J.:—The sole question is the validity of a chattel mortgage dated the 18th May, 1914, made by one

Edward Herman to the defendant. The plaintiff, as the assignee for the benefit of Herman's creditors, contends that the mortgage is invalid, as the date of execution of the mortgage is not stated in the affidavit of the attesting witness. The mortgage purports to bear date the 18th May, 1914, and the affidavit of execution is sworn on the 19th May, 1914. The day of the month has not been filled in, in the printed form, although the month itself is stated.

The precise point is determined adversely to the mortgagee by my brother Kelly in the case of *Cole v. Racine* (1913), 4 O.W.N. 1327. There the day of the week and the day of the month were duly stated but the year was left blank. My learned brother said (p. 1329): "This requirement of the statute is imperative, and it must be construed strictly. Failure to mention the year in which it was executed is, in my opinion, a fatal omission, and such a non-compliance with the requirements of the Act as renders the mortgage void."

The principle applicable to cases of this kind is indicated in *Parsons v. Brand* (1890), 25 Q.B.D. 110, where Lord Justice Cotton says: "With the policy of the Act we have nothing to do, we have only to carry out the intention of the Legislature as appearing in the terms of the Act." And Lopes, L.J., says: "It has been said to be imperious and tyrannical; but with that we have nothing to do. . . . This is not a mere technicality, but a matter of substance."

The clause introduced into the statute requiring the date of the execution of the mortgage to be given* was introduced of fixed purpose, to insure the registration of a chattel mortgage within five days from the date on which it was actually executed, and so to prevent the holding of chattel mortgages undated so that the date might be filled in and registration completed at any time the mortgagee thought it necessary for his protection. A mortgage so registered was of course invalid, but those in-

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*The clause referred to is to be found in the Bills of Sale and Chattel Mortgage Act, R.S.O. 1914, ch. 135, sec. 5: "Every mortgage of goods and chattels in Ontario . . . shall be registered . . . together with (a) the affidavit of an attesting witness thereto of the due execution of such mortgage . . . which affidavit shall also state the date of the execution of the mortgage. . . ."

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terested were compelled to ascertain that the facts were not as they appeared, and to attack the transaction at their peril. The Courts cannot dispense with that which the Legislature has prescribed.

None of the English cases cited are in any way in conflict with this. The English statute in some respects differs from ours; and in all the cases in which the mortgage has been upheld the Court has been able to find that there was a substantial compliance with the statutory requirements. No tendency can be found in any of our own decisions to indicate that this rule should be relaxed. See *Re Andrews* (1877), 2 A.R. 24; *Nisbet v. Cock* (1879), 4 A.R. 200; and *Archibald v. Hubley* (1890), 18 S.C.R. 116.

I, therefore, find in favour of the plaintiff upon the stated case; and there is no reason why costs should not follow the event.

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[APPELLATE DIVISION.]

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CITY OF LONDON V. GRAND TRUNK R.W. CO.

SUMMERS V. GRAND TRUNK R.W. CO.

Railway—Level Highway Crossing in City—Destruction of Fire Truck by Collision with Engine of Train—Injury to Fireman—Negligence—Contributory Negligence—Findings of Jury—Evidence — Rule Made by City Corporation after Collision — Admissibility — Grounds for and against—Substantial Wrong or Miscarriage not Occasioned—Judicature Act, sec. 28—Evidence as to Condition of Head-light on Engine—Admissibility—Effect—"Imminent Danger."

The city corporation claimed damages for the destruction of their motor fire truck on its way to a fire, by a collision with the locomotive engine of a train of the defendants at a place in the city where the railway crossed W. street, on the street level; and S., who was a fireman employed by the city corporation and was in the truck at the time of the collision, claimed damages for personal injuries sustained by him by reason of the collision. The actions were tried together, and the jury, in answer to questions, found: (1) that the collision resulted from negligence; (2) that there was negligence on the part of the defendants or their servants which caused or contributed to the collision; (3) that that negligence was, that the switchman and other employees of the defendants who were standing at the corner of M. street and K. street, and saw the fire truck pass along K. street, going towards W. street, "should have used what power they had at their disposal to have cleared W. street, believing the fire truck might go down that street, employees knowing that the fire was on the south side of the track, also knowing

that 93, a special, was coming from the east;" (4) that the city corporation or their servants could, by the exercise of reasonable care, have avoided the collision; (5) "that the firemen might have stopped the fire truck and made sure the railway crossing was clear, knowing same crossing was a dangerous crossing, also knowing the railroad had the right of way;" (6) that the plaintiff S. could not, by the exercise of reasonable care, have avoided the accident or injury which happened to him. Upon these findings, the trial Judge dismissed the action of the city corporation, and gave judgment for the plaintiff S. for the sum assessed by the jury for his damages. The city corporation appealed in the first action, and the defendants in the second action:—

Held (CLUTE, J., dissenting), that there was no evidence to sustain the 3rd finding of the jury; that the jury, having found no other negligence than that mentioned in the 3rd finding, must be taken to have negatived all other negligence; and, therefore, there being no negligence, the action of the city corporation was properly dismissed, and the action of the plaintiff S. should be dismissed also.

Semble, *per* RIDDELL and SUTHERLAND, JJ., that, if the defendants had been negligent, the plaintiff S. would have been entitled to hold his judgment, for he was not in charge of the truck, and there was no evidence that personally he was guilty of any negligence.

Thorogood v. Bryan (1849), 8 C.B. 115, has been overruled by *Mills v. Armstrong* (1888), 13 App. Cas. 1.

Per CLUTE, J.:—There was evidence of negligence in regard to the conduct of the employees of the defendants which could not have been withdrawn from the jury, and it could not be said as a matter of law that the answer to the 3rd question did not amount to a finding of negligence. The 3rd finding standing, the plaintiff S. was entitled to hold his judgment, the jury having by the 6th finding absolved him of contributory negligence.

Per RIDDELL and SUTHERLAND, JJ.:—When the defendants' servants saw the truck drive rapidly past M. street along K. street, they had no reason to apprehend that a collision was imminent or even likely.

Discussion of the doctrine of "imminent danger" and review of the authorities.

Held, also, *per Curiam*, that the 4th and 5th findings of the jury were warranted by the evidence; and the city corporation, being thus found guilty, by their servants, of contributory negligence, could not succeed even if the 3rd finding stood.

Per CLUTE, J.:—Evidence that, after the collision, a rule was made and put into effect by the city corporation, requiring the driver of the truck, when proceeding to a fire, to stop before crossing the railway track, was improperly admitted; but the admission of it did not occasion any substantial wrong or miscarriage: see, 28 of the Judicature Act, R.S.O. 1914, ch. 56.

Per RIDDELL, J.:—The evidence was properly admitted, not on the ground urged at the trial, but for the purpose of shewing what the firemen might do without interfering with their efficiency—without delaying too long their advent at the fire.

Per SUTHERLAND, J.:—The evidence was not admissible on the ground put forward at the trial, viz., that the passing of the rule shewed what the city corporation considered good practice; but it appeared that the evidence did not influence the jury in coming to the conclusion expressed by the 5th finding; and that finding should not, therefore, be disturbed: Judicature Act, sec. 28.

Per RIDDELL and SUTHERLAND, JJ.:—Though evidence of the condition of the head-light upon the defendants' engine when it arrived at a certain place, some time after the collision, may have been improperly received—without proof that there had been no change in the meantime—that evidence was unimportant in view of the testimony of a large number of witnesses that the light was plainly visible immediately before the collision.

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THE first action was for damages for the destruction of a motor fire engine and truck struck by a train of the defendants at a level crossing; and the second action was for damages for personal injuries sustained by the plaintiff, a fireman, who was on the truck when it was struck by the train.

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The actions were tried together before KELLY, J., and a jury at London.

T. G. Meredith, K.C., for the plaintiffs in the first action.

Sir George Gibbons, K.C., and *G. S. Gibbons*, for the plaintiff in the second action.

D. L. McCarthy, K.C., and *W. E. Foster*, for the defendants.

June 13. KELLY, J.:—These two cases resulted from the same happening, and were tried together before me with a jury at London, the evidence in the two cases being the same. I shall, however, deal with them separately.

City of London v. Grand Trunk R.W. Co. On the 5th August, 1913, between 2 and 3 o'clock in the morning, the plaintiffs' motor fire engine and truck, which was being driven south-erly on William street, in the city of London, was struck by the defendants' freight train, number 93, going westerly, and was so badly damaged as to be rendered practically worthless.

William street, at this point, is crossed by several of the defendants' tracks. Train number 93 was running on the most northerly track.

The plaintiffs claim against the defendants on the ground of negligence in failing to take proper care in the running of the train, and by reason of the breach of statutory duties; and they further allege that the defendants were running the train at an excessive and improper rate of speed; that the bell of the locomotive was not rung and the engine whistle was not sounded as required by statute; and that there was no proper or sufficient light upon the locomotive. A great amount of evidence was given with a view to establishing these claims. The jury in answer to questions submitted to them found that the defendants were negligent in that "the switchman and employees at Maitland street

who saw the fire truck pass Maitland street should have used what power they had at their disposal to have cleared William street, employees knowing that the fire was on the other side of the track, also knowing that number 93, a special, was coming from the east."

Maitland street runs northerly and southerly across the railway tracks, and is the next street to the west of William street. King street, which runs easterly and westerly, is the second street north of the tracks. The fire to which the fire engine was proceeding was to the south of the railway tracks. The fire engine proceeded easterly along King street; the switchman and other employees of the defendants who were at or near the intersection of Maitland street with the tracks, saw it going east on King street on its way to the fire, and also saw the freight train (number 93) east of William street and moving westerly.

These conditions throw light on the meaning of the above answer of the jury. The jury also found that the plaintiffs were negligent in that "the firemen might have stopped the fire truck and made sure the railway crossing was clear, knowing same crossing was a dangerous crossing, also knowing the railway had the right of way."

Counsel for the defendants contend that, even assuming that the defendants were negligent, the jury's finding of negligence on the part of the plaintiffs disentitled them to succeed. Counsel for the plaintiffs, relying upon *Hollinger v. Canadian Pacific R.W. Co.* (1892), 21 O.R. 705, argue otherwise.

In cases such as this, each rests upon its own peculiar circumstances; the circumstances of the *Hollinger* case are quite distinguishable from those which the jury were called upon to deal with in the present case. *Weir v. Canadian Pacific R.W. Co.* (1888), 16 A.R. 100, more nearly approaches a resemblance to this case than does *Hollinger v. Canadian Pacific R.W. Co.* There is here some evidence from which the jury were entitled to draw the conclusion that the plaintiffs, through their workmen, servants, or agents, did not exercise that reasonable care when approaching this dangerous crossing which it was their duty to observe, especially having regard to the facilities they

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had, and, which they did not use, of observing if a train was approaching them.

The driver of the fire engine says he looked and listened for a train, but did not see or hear it; Eddyvane, a city fireman, who occupied a seat beside the driver, and had charge of the search-light carried on the front of the fire engine, says he did not observe the train, though he looked for it; but he says that he did not turn the search-light on to the railway track, and that if he had done so he would have seen the train.

The duty of a traveller in approaching a railway crossing is stated in *Weir v. Canadian Pacific R.W. Co.*, 16 A.R. at p. 104, to be: "To use such facilities of sight and hearing as he may be possessed of, and when he knows he is approaching a crossing and the line is in view and there is nothing to prevent him from seeing and hearing a train if he looks for it, he ought not to attempt to cross the track in front of it merely because the warning required by law has not been given."

There is no finding by the jury of want of warning in so far as the ringing of the bell, the blowing of the whistle, or the presence of the light on the locomotive is concerned, notwithstanding that the claim of want of such warnings was clearly before them on the pleadings and evidence given thereon.

The onus of making out contributory negligence is here upon the defendants, and the matter is to be determined by the jury, if there is evidence that can properly be submitted to them on that question. In my opinion, there was such evidence, and upon it the jury have found against the plaintiffs. On that finding the plaintiffs must fail, and the action must be dismissed with costs.

Summers v. Grand Trunk R.W. Co. The plaintiff in this case was a fireman in the employ of the Corporation of the City of London, and was injured when the defendants' train struck the plaintiffs' motor fire truck referred to in the foregoing judgment in the case of *City of London v. Grand Trunk R.W. Co.* He was riding on the running-board on the westerly or right side of the fire truck, and, when the collision occurred between the defen-

dants' locomotive and the fire truck, he was thrown beneath the truck, and sustained serious injuries.

The finding of the jury in respect of the negligence of the defendants was the same as in the other case; but they also found that Summers could not, by the exercise of reasonable care, have avoided the accident.

The claim set up in the statement of claim is, that the accident was caused by the neglect of the defendants in not giving warning of the approach of the train, as required by law; adding that no whistle was sounded or bell rung as required, and that the train was running at an excessive and dangerous rate of speed.

The defendants' contention is, that the negligence found by the jury does not apply to and is not in respect of the acts or omissions particularly complained of as constituting negligence—that is, running at an excessive and dangerous rate of speed, and failure to ring the bell and sound the whistle, as to which there is no finding by the jury of negligence. If the lack of warning complained of by the plaintiff is not to be confined to the failure to whistle or sound the bell, or to the running at an excessive and dangerous rate of speed, but is, as I think it is, a general allegation of want of warning not limited to these three particular matters, then the finding of the jury that the switchman and employees at Maitland street should have used what power they had to have cleared William street may properly be taken to extend to the giving of a warning in some other manner, such as by the swinging of a lantern; there being evidence that the defendants' employees who were at or near the Maitland street crossing, and who saw the fire truck and the train, had with them lanterns with which they could have signalled the train. If that be the correct view of the meaning of the general allegation of want of warning set up in the statement of claim and the interpretation to be put upon the jury's finding—and I am of opinion that it is—and the jury having negated contributory negligence, the plaintiff is entitled to succeed.

I direct judgment to be entered in his favour for \$600, the amount assessed by the jury, and costs.

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The plaintiffs in the first action and the defendants in the second action appealed from the judgment of KELLY, J.

October 8 and 9. The appeals were heard by MULOCK, C.J.Ex., CLUTE, RIDDELL, and SUTHERLAND, JJ.

T. G. Meredith, K.C., for the appellants the Corporation of the City of London, argued that the defendants had not satisfied the onus which lay upon them. Reference was made to *Hollinger v. Canadian Pacific R.W. Co.*, 21 O.R. 705, 710, and *Weir v. Canadian Pacific R.W. Co.*, 16 A.R. 100. The evidence given as to the order passed by the appellants after the accident, was improperly admitted, and on this ground alone a new trial at all events should be directed. He referred to *Rowan v. Toronto R.W. Co.* (1899), 29 S.C.R. 717, 719.

D. L. McCarthy, K.C., for the Grand Trunk Railway Company, argued that the judgment of the trial Judge in the first case in favour of the defendants was right, as the jury had negatived the acts of negligence charged in the pleadings with respect to the failure to whistle and sound a bell, and the absence of a head-light. There was no evidence as to the speed of the train, and the jury did not accept the story of the driver of the truck that it was only going four miles an hour. There was evidence to support the contention of the defendants as to their having given warnings by bell and whistle, and as to there having been a head-light. There was no evidence to support the finding of the jury as to the negligence of the defendants, and in doing so they have in effect assumed to lay down propositions of law. The defendants were also entitled to succeed in the second case, as, on the case made by the plaintiff, it was not open to the jury to find that the defendants had been negligent in respect of the matters referred to in the answer to the third question. The railway employees at Maitland street were not bound to stop the train; and, even if they had done what the plaintiff says they should have done, it would not have prevented the accident.

Sir *George Gibbons*, K.C., and *G. S. Gibbons*, for the plaintiff Summers, argued that the judgment of the learned trial Judge in the second case should be affirmed. The men on the truck

had done everything in their power to give notice to the defendants of the imminence of the danger, and it was the duty of the railway employees to stop the train at once. They referred to Shearman and Redfield's Law of Negligence, 6th ed., vol. 2, p. 1244; *Canadian Pacific R.W. Co. v. Hinrich* (1913), 48 S.C.R. 557; *Smith v. Niagara and St. Catharines R.W. Co.* (1904), 9 O.L.R. 158; *Burtch v. Canadian Pacific R.W. Co.* (1906), 13 O.L.R. 632.

December 24. SUTHERLAND, J.:—Appeals in two actions against the defendant company, tried together, by consent, by Kelly, J., with a jury, at London.

The actions arise out of a collision between an electric motor fire truck, owned by the City of London, the plaintiff corporation, and an engine of the defendant company, in which the truck was badly damaged, and one of the city firemen, the plaintiff Summers, not its driver, but one of several firemen riding on it on their way to a fire, injured.

The line of the defendant company through the city of London runs east and west, and York and King streets are the first and second streets to the north thereof running parallel with it. The accident occurred at a crossing where the line of railway is intersected by William street, which runs north and south. Maitland street is the first street to the west of William street, and Adelaide street the first to the east, and these streets cross the line of the railway in a direction parallel to William street.

On the morning of the 5th August, 1913, a fire alarm having been rung from the box at the corner of William and Hill streets, south of the line of the railway, the truck in question, at about 2.30 a.m., left its fire station, on King street, five streets west of Maitland street, and travelled east along King street at a speed variously estimated by the witnesses at from 10 to 30 miles an hour. If the driver had known where the fire was, he would have turned down Maitland street, but, not knowing, continued on to Maitland street, and then turned south. He slowed down on William street at first to 15 miles an hour, and it is said that by the time he reached York street and from then on until the accident occurred he proceeded at a rate of 5 or 6 miles an hour.

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At about the time the truck started for the fire, a freight train, No. 93, was approaching Adelaide street from the west. The engine had whistled first for the crossing and then for the semaphore, which was situated a little west of that street, but operated from Maitland street. The switch-tender at Maitland street let the train in, and, passing Adelaide street and drifting slowly or with very little steam, and at a rate of 5 or 6 miles an hour, it came on to William street, where the accident occurred.

These actions were thereupon commenced, the one by the Corporation of the City of London for damages to the truck, the other by Summers for the physical injury sustained by him. The negligence charged against the defendants in the statement of claim of the plaintiff corporation is "in failing to take proper care in the running of the train and by reason of the breach of the statutory duties imposed" upon them and "in running their train at an excessive and improper rate of speed, and that the bell of the locomotive engine did not ring," and the whistle was "not sounded as required by statute," and that there was "no proper or sufficient light upon the engine," and that "the train and cars were not, as required by the statute, provided with sufficient apparatus and appliances to check the speed of the train and bring it to a stop in the quickest time possible."

In the statement of claim of the plaintiff Summers it is alleged that the accident was caused by "the neglect of the defendants in not giving warning of the approach of the said train, as required by law; no whistle was sounded or bell rung as required, and the said train was running at an excessive and dangerous rate of speed." The evidence of the men on the truck was to the effect that they did not see the engine until the truck was almost, if not quite, on the track, and when it was only about 10 feet away.

The evidence for the defence was that the head-light on the engine was shining and the bell ringing up to the time of the accident. The truck was also equipped with a head-light and other lights. The evidence also disclosed the fact that just before the accident a yard foreman, named Munnings, was operating a yard engine at Maitland street, and between that street

and William street, and had pushed 5 or 6 cars out of a siding and about a car length over Maitland street. He had seen the fire from the top of a car, and, when he descended to the ground, heard the loud-sounding screech of the siren with which the truck was equipped, and which was being operated at intervals all along King street and part of the way on William street, as the truck hastened to the fire. Munnings says that, expecting the truck to come down Maitland street, he pulled the cars back to clear the street. Thereupon he, the engineer of the yard engine—Lazenby—a yard helper—Heatherley—and a switch tender—Paisley—gathered together on the crossing “to watch the fire department coming down Maitland street.” They saw the truck pass Maitland street on King street, and watched “for them to come down Adelaide or William street.”

During the examination of the defendant company’s employees, called as witnesses on the company’s behalf, it developed that some of them were equipped with lanterns. They were asked about the possibility of signalling the on-coming train from that point with the lanterns and stopping her before she reached the William street crossing. Buildings intervened between the Maitland street crossing so as to prevent the truck being seen by the men at that crossing from the time it went by Maitland street on King street until it was almost on the track at William street. From the plan put in at the trial and the evidence it is plain that, in consequence of the buildings and erections obstructing their view, the men on the truck would be unable to see the engine approaching William street, and the engineer unable to see the motor truck until each approached the crossing.

It was suggested in argument at the trial that, seeing the truck going rapidly along King street, and realising that it would come down either William street or Adelaide street, and probably the former, the defendant company’s employees on the crossing at Maitland street should have been apprehensive that an accident might occur or was imminent, and should have swung their lanterns or done something to avert it.

The questions submitted to the jury and their answers are as follows:—

(1) Did the collision between the defendants’ locomotive and

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the motor fire truck result from negligence, or did it happen by mere accident? A. From negligence.

(2) If it resulted from negligence, was there any negligence on the part of the defendants, or their servants, workmen, or agents, which caused or contributed to the collision? A. Yes (by ten.)

(3) If there was any such negligence on the part of the defendants, their servants, workmen, or agents, set forth fully and clearly the act or acts or omissions or omission on their part which caused or contributed to the collision? A. We firmly believe that the switchman and employees at Maitland who saw the fire truck pass Maitland street should have used what power they had at their disposal to have cleared William street, believing the fire truck might go down that street, employees knowing that the fire was on the south side of the track, also knowing that 93, a special, was coming from the east.

(4) Could the plaintiffs the City of London, their servants, workmen, or agents, by the exercise of reasonable care, have avoided the collision? A. Yes (by twelve.)

(5) If so, state fully and clearly what they should have done or omitted to do to avoid the collision? A. We are absolutely agreed that the firemen might have stopped the fire truck and made sure the railway crossing was clear, knowing same crossing was a dangerous crossing, also knowing the railroad had the right of way.

(6) Could the plaintiff Percy Summers, by the exercise of reasonable care, have avoided the accident or injury which happened to him? A. No.

(7) If so, what should he have done or omitted to do to avoid such accident or injury to him?

(8) If, on the answers you have given to the foregoing questions, the Court should be of opinion that the defendants are liable to Percy Summers, at what amount do you assess his damages? A. \$600.

On these answers judgment was entered dismissing the action of the plaintiff corporation with costs, and for the plaintiff Summers for the sum of \$600 and costs.

The plaintiffs the corporation appeal. On their behalf it is

contended that exception was taken at the trial, at the time of its reception, and after the charge to the jury, to the admissibility of evidence on the part of the defendants brought out on the examination by their counsel from witnesses of the plaintiffs to the effect that after the accident a rule of the plaintiff corporation was passed and put into effect requiring the driver of their motor truck, when proceeding to a fire, to stop before crossing the railway track. Counsel for the defendants was persistent in getting this evidence on the record and contended that it was admissible as shewing what the plaintiff corporation considered good practice.

It was argued before us that, in consequence, the finding of contributory negligence as against the plaintiff corporation's employees should not be allowed to stand, and that there should at least be a new trial. I am of opinion that the evidence was not admissible on the ground contended for; but the trial Judge seems to have so minimised any effect it could otherwise have had in the following statements—"I do not know that we have anything to do with orders made afterwards," "Some people are always wise after the event." "It may be (evidence) or it may not be," "We all learn by experience," "But would it be evidence of negligence?" "I will allow the question, but I do not think it has much bearing on the case"—and the language used by the jury would seem so to indicate that the evidence did not affect them in coming to the conclusion arrived at, that I do not think the finding should be disturbed. I think the provisions of sec. 28* of the Judicature Act, R.S.O. 1914, ch. 56, may well be applied, I am of the opinion that the finding as it stands is abundantly justified by the evidence.

On the question of contributory negligence, in so far as the plaintiff Summers is concerned, as he was not the driver of the truck, and there was no evidence that personally he was guilty of any negligence, he is entitled to maintain the action notwithstanding the negligence of which the jury has found the plain-

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*28.—(1) A new trial shall not be granted on the ground of misdirection or of the improper admission or rejection of evidence, or because the verdict of the jury was not taken upon a question which the Judge at the trial was not asked to leave to the jury, unless some substantial wrong or miscarriage has been thereby occasioned.

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tiff corporation guilty through their servants in charge of the truck: *Mills v. Armstrong* (1888), 13 App. Cas. 1.

There was on the appeal some question raised as to the admissibility of evidence as to the condition of the head-light on the engine when it arrived at Sarnia some time after the accident. I do not think, however, that the slight evidence, thus perhaps erroneously admitted, could be said to have any appreciable effect on the minds of the jury, in view of the very strong evidence put in upon the part of the defendants to the effect that at the time of the accident, and for some time before, the head-light was shining.

It was suggested in evidence, also, that the engineer on the train ought to have heard the siren sounded and have seen the light from the head-light of the truck cast upon the railway crossing as it approached thereto, or that the brakesman on his train should have heard the siren and seen the light of the approaching truck. Indeed, it was said that he did see the light, and that, in consequence, the engine and train should have been stopped before reaching the crossing. Some argument was also based upon the fact that there was apparently no appliance on the train by which the brakesman, when he saw the light of the truck, could signal to the engineer. The jury has, however, negatived all allegations of negligence on the part of the defendant company set out specifically in the pleadings or otherwise suggested in the evidence, with the exception of that contained in the answer to question 3.

The main question, in my view, in the appeals, is as to whether this finding can stand. It is attacked by the defendant company. The trial Judge seems to have thought that it was open to the plaintiffs on the statement of claim as framed to adduce evidence in support of this finding. With respect, I have great doubt as to this. If they had no such right, then they did not ask or obtain an amendment to the pleadings to enable it to be set up. Objection was taken to its admissibility at the trial. However, I prefer to deal with it as though the evidence were properly admitted.

It is, I think, clear from the evidence that, at the time the semaphore was operated from Maitland street and the train let

in at Adelaide street, there was no danger apparent or imminent. But the contention of the plaintiffs is that, when the railway men at Maitland street saw the truck drive rapidly past that street on King street, a situation of danger, of impending and imminent danger, arose. The jury seem to have accepted this view, and, in consequence, made the finding in answer to question 3 which is attacked by the defendant company on this appeal.

In Shearman and Redfield's work on the Law of Negligence, 6th ed. (1913), vol. 2, pp. 1244, 1245, the doctrine of imminent danger is discussed as follows: "Thus, a locomotive engineer or motorman, after becoming aware of the presence of any person on or dangerously near the track, however imprudently or wrongfully, is bound to use as much care to avoid injury to him as he ought to use in favour of one lawfully and properly upon the track, that is to say, ordinary care with respect to anticipating injury, before it becomes imminent, and the utmost care and diligence of which he is personally capable, after he knows that it is imminent."

Now what was the situation at the time the truck passed Maitland street on King street? The men at Maitland street saw the engine and train beyond William street approaching that street with head-light shining and bell ringing. The train was in fact also running at the slow rate of 5 or 6 miles an hour. They saw a fire truck, which they had a right to assume was equipped, as according to the evidence it in fact was, with proper appliances to stop it within a few feet if driven at a reasonable rate and without negligence, and they had a right to assume also, as the fact was, that it was in charge of a competent and experienced driver, who knew the locality and the dangerous character of the railway crossing on William street. After the truck went by Maitland street on King street, they knew it would have to travel three blocks at least before it could arrive at the railway crossing at William street. They could not meantime see it for the intervening buildings. Unless they were to assume, which I am of opinion they were not called upon to do, that the truck, thus manned, would be driven negligently and carelessly on to the track in front of the approaching engine, there was no reason

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to apprehend that a collision was at all imminent or even likely. So far as they were concerned, an accident only became evident and imminent when the truck appeared on William street near the railway track. It was then apparently too late for them to do anything to avert the accident. Under these circumstances, I am of opinion that the finding of the jury in answer to question 3 is unwarranted by the evidence and should not be allowed to stand.

Much attention was drawn to the evidence of Paisley in this connection. At the trial, after the charge to the jury, the following discussion took place:—

Sir George Gibbons: And I did not overstate or incorrectly state the evidence of Paisley (taken *de bene esse*), and I think it ought to have been referred to by your Lordship. He said in answer to some questions:—

“(116) Q. When did you first notice the fire? A. It was before the train came in sight; the train must have been at Rectory street. She whistled off; when the train whistled off, I got up on my feet.

“(117) Q. The train was at Rectory street then? A. Yes, she was not in sight.

“(118) Q. I suppose you kept watching the fire? A. Yes, kept watching the fire brigade so I could stop 93 if the brigade came.”

Mr. McCarthy: Down William street?

Sir George Gibbons: If there was danger. If your Lordship will look at question 118: “I suppose you kept watching the fire? Yes, watching for the fire brigade, as I could stop 93 if the brigade came.” The danger was just as imminent if it came down Maitland street as it was if it came down William street, and he know that danger was imminent if it came down Maitland street, and he was watching for that purpose. Further questions:—

“(119) Q. You heard the fire brigade? A. Yes; the fire had been burning quite a little while before they came.

“(120) Q. They didn’t turn down your street? A. No.

“(121) Q. They turned down William street? A. Yes.

“(122) Q. If they turned down your street you would have stopped them? A. Yes.”

He said before he would have stopped 93.

His Lordship: Is that following on from 118?

Sir George Gibbons: Yes, my Lord, right on.

“(124) Q. You didn’t have time to run up to William street to stop 93? A. I didn’t think the fire truck would get there so quickly.”

“If there was danger there at Maitland street, there was more danger at William street, because it was nearer to where the train was. So that there was imminent danger, and he said he knew of it, and I think it is perfectly proper to argue so to the jury. That negligence, with knowledge of the danger, should have been provided against, and if it is not in the pleadings that is wholly immaterial. It comes out in the evidence supplied by the defendants themselves. It is no surprise. If on their own evidence negligence is shewn, the jury are entitled so to find.”

It seems to me, however, that the proper view to take of this evidence is as follows. When the men speak of clearing Maitland street or William street, I do not think, from the evidence, that the meaning they intend to convey is, to clear it so as to avert an accident, or that they thought there was any duty cast upon them on that account. I think it is clear that their idea was to clear the street so as to enable the truck to get more quickly to the fire box or the fire. It was not, I think, on account of anticipated or imminent danger, but merely so as to try and not delay the truck in its course.

To say that men in the positions of the railway employees at Maitland street were to assume the responsibility of stopping a train approaching William street, in the circumstances disclosed in the evidence, merely because they saw a fire truck passing rapidly along King street, three blocks away, and because they failed to do so, the defendants are to be made liable, is, I think, carrying the doctrine of liability for negligence against a railway company altogether too far. I would be disposed to think, from the evidence, that in any event it was most unlikely that the said employees could have done anything after

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the truck had passed Maitland street on King street to avert the accident.

It is said that if the lanterns had been swung at the crossing at or near Maitland street the engineer on the train could have seen them and stopped the train. The evidence was, however, to the effect that in practice it was customary for the train when signalled to stop to slacken its speed and approach slowly the point on the track from which the signal was given. Here the train was proceeding at a comparatively slow and apparently safe rate of speed, and, if it had been signalled from Maitland street, it would not in all reasonable probability have passed William street at any slower rate than it did.

I am of opinion that the appeal of the plaintiff corporation should be dismissed with costs, and the appeal of the defendant company as against the plaintiff Summers allowed with costs, if asked.

At the conclusion of his argument, Sir George Gibbons, in view of the fact that the judgment for Summers was only \$600, and that he would in consequence have no further right of appeal, asked that, in the event of the present appeal of the plaintiff corporation being disallowed and such corporation making a further appeal and being successful, the right of the plaintiff Summers be preserved to share in such ultimate success.

Under these circumstances, it may well be that no judgment on this appeal should be issued as against the plaintiff Summers, dismissing his action, until the further appeal, if any, of the plaintiff corporation is finally determined.

MULOCK, C.J.Ex.:—I agree with my brother Sutherland's disposition of these appeals.

As to that of the City of London against the Grand Trunk Railway Company, there is ample evidence to support the answer of the jury to question 5. The evidence shews that the Grand Trunk Railway crossing was a dangerous one. On the east side of William street to within 25 feet of the north rail of the northerly track was a sign-board fence, 12 feet 6 inches high, and which at this 25-foot point ran easterly some distance, then a few feet easterly of that is a barn, extending 18 feet north and south and some 22 feet 6 inches high.

This fence and barn seriously interfered with the view along the track of any one coming southerly on William street.

Further, the neighbourhood in the vicinity of the crossing was badly lighted. Thus there is evidence to support the finding that it was a dangerous crossing, a crossing calling for special care being exercised before one attempted to cross.

The jury in their answers to questions 4 and 5 state in the most unqualified language that the plaintiffs, through their employees, might have avoided the collision by stopping the fire truck and making sure that the railway crossing was clear. Reading the answers to these two questions together, the jury find that the plaintiffs did not exercise reasonable care, and that, if they had, the accident could have been avoided. There being evidence to support these findings, the plaintiffs are not, in my opinion, entitled to recover, even if the defendants had been guilty of negligence. I fail to discover any evidence in support of the jury's finding of negligence on the part of the defendant company.

In the Summers case the plaintiff was guilty of no negligence, and, if there was evidence to support the finding of negligence on the part of the defendant company, his verdict should stand; but, in the absence of negligence by the defendants, the plaintiff has no cause of action.

RIDDELL, J.:—On a clear starlight night in August last, eight firemen of the City of London were proceeding to answer a fire-call, riding on a motor truck. Going south on William street, while crossing the line of the Grand Trunk Railway, their vehicle was struck by an engine proceeding westward. The truck was badly shattered and some of the men were injured. Summers, one of these, brought an action against the railway company for his injuries; and the city corporation brought an action for the destruction of their truck. The actions were tried together, in April, 1914, before Mr. Justice Kelly and a jury. On the answers of the jury to questions submitted to them, the learned trial Judge dismissed the action of the city, and gave judgment for Summers for \$600 and costs. The unsuccessful litigants appealed; both appeals were heard together, so that in

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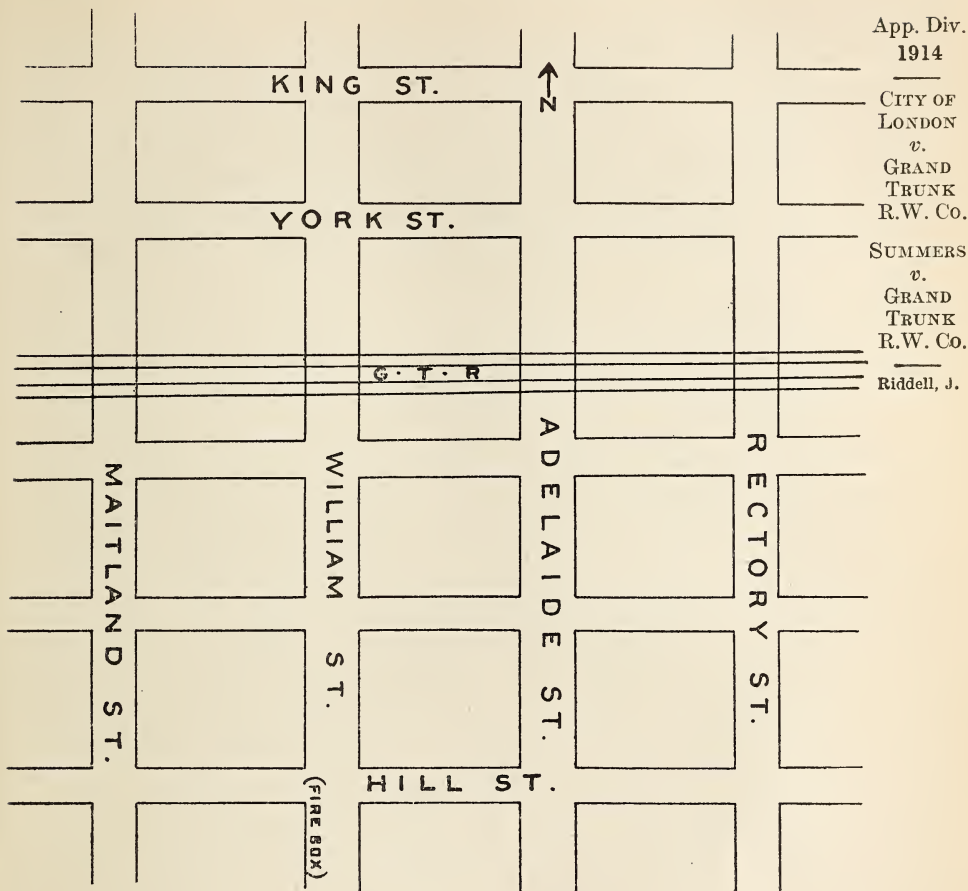
each case we have the advantage of the arguments, able and earnest, in both. The findings of the jury are attacked, and it will be well to set them out at once (findings set out as above).

It will be seen that the jury have convicted the railway company of negligence through certain of their employees, and also the City of London through their firemen. While the plaintiff Summers was one of the firemen, he was not in charge of the truck, and it is admitted that he cannot be made liable for negligence in the management and running of the truck. *Thorogood v. Bryan* (1849), 8 C.B. 115, has been authoritatively and irrevocably overruled by *Mills v. Armstrong*, 13 App. Cas. 1. If then the findings of negligence against the railway company stand, he must succeed in this appeal; while to enable the city to succeed, not only must these stand, but also the findings against the city must be set aside.

It will be convenient to examine into the findings of negligence against the railway company in the first instance. To make the evidence easily understandable, regard must be had to the topography. I have made and hereto annex a plan which will be sufficient for that purpose, although it is not drawn to scale, and makes no pretence to accuracy.

The facts of the movements and control of the fire truck are not in controversy. It left the fire station on King street about 2.32 on the morning of the 5th August, and proceeded east along King street, continuously sounding the siren, which can be heard a mile or more; its screeching continued to York street. The engine of the motor is a powerful one, 80 H.P. or thereabouts; and it went at a considerable speed, perhaps eight or ten and up to fifteen miles or more per hour (pp. 54, 55). It passed east along King to William street, down which it turned, slowing down at the turn and running at a rather slower rate half-way down the block between King and York, when the speed was gradually lowered to five or six miles per hour at York street. Going fifteen miles per hour the truck could be stopped in 15 feet; at eight or ten miles per hour in ten feet.

The truck had a large head-light, an electric search-light, and two large acetylene lights in front with reflectors; and one



could see a block ahead of the vehicle. The head-light is movable to either side, and the lights were all going.

The men in charge of the machine were drilled on the machine; the driver was thoroughly competent and experienced, and had been at fires many times before. No suggestion is made that the men were not all *compotes mentis* in every way.

Then as to the train which it is claimed was in fault. The plaintiffs by their pleadings set out four causes of complaint: (1) want of a bell; (2) failure to whistle; (3) undue speed; and (4) want of head-light on engine. The jury have negatived all these. The bell was automatic, the whistling prescribed by the statute was made; it is the case of the plaintiffs upon which they base an argument that the train was "drifting in," and,

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so far from there being no light on the engine, there was not only the usual head-light, but also the two classification lights one on each side. So far as appears, all the men on the train were competent and careful. The employees referred to in answer to question 3 were Paisley (the "switchman") Munnings, Heatherley and Lazenby; the train whose engine struck the motor was a special freight No. 93, running regularly from Mimico to Sarnia.

Paisley was in charge of a switch-house at the south-east corner of Maitland street. He heard 93 calling on the flagman some distance east, and, after doing some work, he, standing on the north side of Maitland street, heard her some distance east of Adelaide street whistle for the semaphore, and he let her in. (The board is at Adelaide street, though it is worked from Maitland street). It is this which is charged as negligence against Paisley; and it is necessary to see what Paisley's knowledge was of any impending danger—imminent danger.

Before the train came in sight or whistled for the board, Paisley knew of the fire on Hill street, and expected the fire brigade, and kept watching for it. But the fire had been burning some time before the brigade came. Paisley does not seem to have heard the motor truck until after he had turned the semaphore (QQ. 51-55). He heard the siren blowing, shewing that the truck was coming east on King street, but did not see the truck till it passed Maitland street, at a high rate of speed, going east on King street—the train being then west of Adelaide street. After that, he did not see the truck till the accident, remaining as he did at his post at Maitland street. Some point is made of answer to Q. 122: "Q. If they turned down your street, you would have stopped them? A. Yes;" but the witness is speaking of stopping the truck, not the train.

Munnings is the yard foreman, and had been shunting. In the operation he had pushed his train so that it crossed Maitland street. Hearing the siren of the truck and seeing the fire, he hastened to clear Maitland street for the firemen, whom he expected to come down that street, and then stood at Maitland street with his mates and Paisley to see the truck go by. He had heard a train some distance east of Adelaide street whistle

for the semaphore before he heard the siren, and before clearing the street, but did not know what train it was. He, standing at Maitland street, saw the truck pass Maitland street, going east on King street, and did not see it again until the accident. When the truck passed Maitland street, he expected it would come down Adelaide street or William street, and it did not occur to him that if it came down William street there would be trouble, and he did not anticipate trouble.

Heatherley was the yard helper. He saw the fire and heard the fire apparatus. Expecting it to come down Maitland street, he went and stood at the crossing. He saw the truck pass Maitland street on King street, and expected it to turn down William or Adelaide street. While standing there, after he saw the truck pass or "just at that moment," he heard the train whistle for the semaphore. This witness says that, had the truck gone down Adelaide street, the board would have had to be lowered to let the train go by, and it would be more dangerous with the cars standing than moving. He also says that he would, of course, not have given permission to come on—perhaps because that was no part of his duty. I do not find anywhere any suggestion by him that any railway employee was derelict in any respect.

Peter Lazenby was the engineer of the yard engine. Coming out from the switch, he saw the fire. He, upon Munnings' orders, hastened to get the cars off Maitland street to let the truck go through, as Munnings said the truck was coming. He then got on the ground, expecting the truck to go through, but, as he heard, it passed Maitland street. He then looked east to see where it would cross the railway to go to the fire, and, looking east, he saw it when about Adelaide street; this when the truck was about Maitland street. He expected that the firemen would see the train and stop; and by the time the truck passed Maitland street the switchman had turned the semaphore, and it was too late to undo that. Nevertheless, if Lazenby had known that the truck was coming down William street, he would have signalled the train to stop.

Under these circumstances, the plaintiffs claim to apply a supposed rule of "imminent danger." An examination of the cases will shew that this is not a special rule, but is a special

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instance of the application of the ordinary rule of negligence, either primary or ultimate.

Counsel cites the very valuable work on negligence by Shearman and Redfield, 6th ed., vol. 2, p. 1244; and I do not know that that rule is anywhere better expressed: "A locomotive engineer . . . after becoming aware of the presence of any person on or dangerously near the track, however imprudently or wrongfully, is bound to use as much care to avoid injury to him as he ought to use in favour of one lawfully and properly upon the track, that is to say, ordinary care with respect to anticipating injury, before it becomes imminent, and the utmost care and diligence . . . after he knows that it is imminent." This is, of course, clear law; and, moreover, this common law duty is quite apart from and in addition to the statutory provision. But there must be knowledge that the danger is imminent; not simply knowledge that the danger is possible. It has been universally held that if an engineer sees a person walking on or near the track he has the right to assume that he is in the possession of all ordinary faculties, and will therefore act with ordinary prudence: Shearman and Redfield, vol. 2, p. 1248. "The engineer may presume, until the situation would otherwise disclose itself to a man on guard, that an adult person on the track or approaching the track is in full possession of his senses, knows that he must yield precedence, and will exercise ordinary care and diligence to take care of himself:" Elliott on Railroads, vol. 3, para. 1153. The same rule is laid down in Beach on Contributory Negligence, 3rd ed., para. 203, and by Wharton on Negligence, para. 389a, the latter work adding: "But it is otherwise with persons apparently not capable of taking care of themselves, such as very young children and persons lying helpless on the track" (apparently not lying *beside* the track: *Tucker's Administrator v. Norfolk and Western R.R. Co.* (1896), 92 Va. 549.) See Cyc., vol. 33, p. 800; 23 Am. & Eng. Encyc. of Law, 2nd ed., p. 748. That it is the knowledge and not the fact that is material is shewn by such cases as *Nichols v. Louisville and Nashville R.R. Co.* (1888), 6 S.W.Repr. 339, where a deaf mute was run down, the engineer not knowing of the infirmity; *Candee v. Kansas City and Independence*

Rapid Transit Railway (1895), 130 Mo. 142; or an imbecile: *Daily v. Richmond and Danville R.R. Co.* (1890), 106 N.C. 301. And the same rule applies where persons are approaching a track walking or in a vehicle: *Purdy v. Grand Trunk R.W. Co.* (1904), Court of Appeal for Ontario, unreported;* *Green v. Los Angeles Terminal R.W. Co.* (1904), 143 Cal. 31; *Ohio and Mississippi R.W. Co. v. Walker* (1887), 113 Ind. 196. The railway engineer may "presume that the person will himself take all proper precautions to avoid injury:" *ib.*, at p. 201; and *Western Maryland R.R. Co. v. Kehoe* (1896), 83 Md. 434, puts it thus: to be liable it must be proved that the defendants' servants (1) knew of the peril (2) in time to avoid an injury, and (3) failed to exert proper care to avoid the injury. "No general duty rests upon the engineer in respect to a traveller whom he sees approaching the crossing . . . he . . . is only called upon to act when the traveller is so near the crossing as naturally to startle him by a sense of danger:" *Dyson v. New York and New England R.R. Co.* (1888), 57 Conn. 9, at p. 23; *Matthews v. Atlantic and North Carolina R.R. Co.* (1895), 117 N.C. 640, at p. 642. I do not cite others of the very numerous cases referred to in the text-books. I have read a hundred or so of them.

The supposed rule reduces down to this: one in charge of a dangerous object, knowing another is in danger of injury from that object, must exercise all care to avoid such injury.

In none of the cases is there any such contention as is here set up; nor, as I think, can it succeed on principle. To charge the railway company's servants with negligence, we must charge them with knowledge that a collision was likely to occur. Here, they did not know that the truck was going fast, if it was going fast. They did not know and had no reason for suspecting that the firemen would fail to see the engine, or the engineer on the engine fail to hear the siren or see the truck. Even if they had seen (which they did not) the truck approaching the track, they had no right to suspect that the driver would act negligently and cross the track in front of the train.

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*See the reference to this case in *Jones v. Toronto and York Radial R.W. Co.* (1911), 23 O.L.R. 331, at p. 334.

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One way, and that not unfair, to test the reasonableness of what is suggested, is to suppose a passenger train stopped under such circumstances. A passenger asks, "Why are we stopped?" and is told, "Because a switchman has heard a fire truck coming to a fire and he is afraid our train may run into it at a crossing." The passenger asks, "Are the men of full age?" "Yes." "Experienced?" "Yes." "Sober?" "Yes." "Appliances good?" "Yes." "Have they ever had such an accident before?" "No." Would it not be the climax of absurdity to say that the passenger should be satisfied?

I think that there was no imminent danger, and that, if there was, the servants of the railway company did not know it.

In that view, I do not think it necessary to consider whether they could have done anything effective, nor do I consider the statement of one of the witnesses as to what he would have done had he known something he did not know. This is hypothetical, and at best a statement of the witness's mind. We are not here to consider what a particular person would have done under certain circumstances, but what the law's favourite "reasonable man" would do.

In my opinion, both of the actions should be dismissed.

But the city corporation have another bar in their way, i.e., the finding of contributory negligence.

I do not read the answer of the jury as laying down any general rule, but as saying what the firemen should have done in this particular case. In that view I cannot say that their finding is not such as twelve reasonable men could make.

The city corporation complain of the admission of evidence on two heads:—

1. As to orders of the city corporation after the accident. Upon Summers' cross-examination the following took place: Mr. McCarthy, for the railway company, is cross-examining:—

Q. What were the orders at the time of the accident in reference to approaching tracks—or were there any? A. I never heard of any.

Q. Did you hear of any orders being passed afterwards? A. I heard that they were passed.

Q. What were they?

Mr. Meredith: I object to that, my Lord.

Mr. Gibbons: I object to it also, your Lordship.

Mr. McCarthy: It is some evidence of what the city considered proper practice.

His Lordship: I don't know that we have anything to do with orders made afterwards.

Mr. McCarthy: But it is some evidence, I submit, of what the city considered good practice, my Lord.

His Lordship: Some people are always wise after the event.

Mr. McCarthy: But it is some evidence of what the city considered proper practice.

His Lordship: It may be, or it may not be. We all learn by experience.

Mr. McCarthy: But it is evidence of what is considered proper precaution to take hereafter.

His Lordship: But would it be evidence of negligence? I will allow the question, but I do not think it has much bearing on the case.

Mr. Gibbons: Well, my Lord, I object to it.

Mr. Meredith: And I object to it, my Lord.

Mr. McCarthy: What were the orders? A. I understood they were to stop at crossings.

His Lordship: Did you see them? A. No, sir.

Mr. Meredith: Then do not give evidence about them.

Charles Scott, another fireman, on his cross-examination was asked by the same counsel:—

Q. But above the din of that collision you heard what you say was the brakes going on; now then, since the happening of this accident they compel you to stop at all the crossings now?

Mr. Meredith: I object to that.

Witness: Yes.

His Lordship: He has answered it.

Remembering that the negligence found against the city was the failure of the men to *stop*, it must be obvious that this evidence was of the greatest significance; and, if the finding was the decisive one, I think that a new trial must needs be had, unless the evidence was properly admitted. In my view, however, the action fails by reason of the want of negligence of the defend-

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ants, and therefore this finding of contributory negligence is immaterial.

If, however, I am wrong in my view, I do not think the objection to the evidence can prevail.

It is clear that it cannot be admitted on the ground put at the trial, as "some evidence of what the city considered good practice." What the city may consider good practice is of no importance; it is the "reasonable man" whose judgment is to prevail. Moreover, the order may have been *ex abundanti cautela*, and the city may well have thought the former practice careful and proper.

But it is evidence of what the men might do without interfering with their efficiency—without delaying too long their advent at the fire. It is not wholly unlike the case of a guard being put on a machine after an accident has taken place. The Judges have not been uniform in the matter of admitting such evidence; the better practice is to admit it, not as proving negligence but as proving that it was possible to guard the machine. Of course a prudent admission by counsel will prevent the evidence being admitted; and, if counsel make a wrong use of the evidence in the address to the jury, the other side is entitled to have the trial Judge charge on the point.

2. Then it is said that a witness was allowed to speak of the head-light on the engine some time after the accident, without proof that there had been no change in the meantime. We are informed that this missing link was omitted owing to personal reasons not affecting counsel for the city. Even if the evidence should have been struck out, it cannot be said to have been important, in view of the evidence of a large number of witnesses that the light was plainly visible.

I do not think that, even if the finding of negligence against the railway company should stand, the city can have a new trial.

CLUTE, J.:—Appeals from the judgment of Kelly, J., after a trial with a jury, dismissing the action of the City of London, and directing judgment for the plaintiff Summers for \$600 on the findings of the jury.

The injuries complained of occurred in a collision between the defendants' railway train 93 and a motor truck connected with the fire department of the City of London, at the crossing of the Grand Trunk Railway on William street, in the city of London. By consent the actions were tried together. The railway, which runs east and west at this point, is crossed, beginning at the west, by Maitland street, the next street east William street, and next to that, east, Adelaide street.

A fire occurred at the corner of Maitland street and Hill street, Hill street being the third street south from the railway line. The nearest alarm bell was that on William street, south of the railway track. It was explained in the evidence that the firemen without further information go to the point where the alarm is given. At the time the fire occurred, there were a car and yard engine on the crossing at Maitland street. The men in charge of the car heard the siren on the truck car, and, knowing of the fire, promptly cleared the crossing of the engine and car. At this time, train 93 was coming from the east and came in sight at Rectory street, east of Adelaide, and blew for the semaphore to be dropped at Adelaide street. This was heard by the switchman who operated the semaphore at Maitland street, and he also saw the train. He dropped the semaphore, and the train came on.

After removing the engine and car, Munnings, the yard foreman, Lazenby, the engineer, Heatherley, the yard helper, and Paisley, the switchman, stood on the crossing at Maitland street expecting the motor truck, which was on King street north of the track and west of Maitland street, to go down Maitland street and across the railway at this point. In the meantime, the firemen, having heard the alarm, had got out the motor truck used in connection with the fire department, and were rapidly moving easterly down King street. Had they known that the fire was in Maitland street, doubtless they would have turned down that street, but the alarm having come from William street, they proceeded on to William street, and turned south down William street. The distance of King street where it crosses William street is a block and a half north from the Grand Trunk Railway. The evidence shews that the car proceeded rapidly down

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King street; that it reduced its speed going down William street, and slowed up as it approached the crossing. The men on the truck swore that they heard no bell or whistle and saw no head-light. There is strong evidence given by the railway employees that the train whistled at Adelaide street, and the bell rang continuously till the accident happened, and that the engine bore the usual head-light, and, being a special, there was a white light on the north side of the engine.

The particular charges of negligence in the statements of claim are that the bell did not ring, the whistle did not blow, the train was travelling at an excessive rate of speed, and that there was no head-light. None of these charges of negligence were found in favour of the plaintiffs, and the negligence found was upon a charge not pleaded, but upon which a considerable amount of evidence was brought out from the defendants' witnesses at the trial, and both parties treated the question so raised as an issue to be tried.

The questions submitted to the jury and their answers are as follows (setting them out as above).

It will be seen that the plaintiffs' case rests upon the answer to the third question.

It was contended on behalf of the railway company that the mere fact that the switchman and the other employees mentioned knew of the fire, heard the siren, and saw the motor truck passing down King street, did not raise any duty upon the part of the defendants to take any means to stop the train; that, the jury not having found negligence in respect of any particular charge in the statement of claim, there was no evidence upon which the jury could pronounce negligence against the railway company.

On behalf of the plaintiffs it was contended that the switchman was in fault because he lowered the semaphore at Adelaide street and allowed the train to pass after it was known by the switchman and employees that the motor truck was about to cross the railway track to go to the fire. As to this point the evidence is contradictory. Some of the witnesses say that the semaphore was lowered before the truck car was known to be about to cross the track. The switchman says, as I understand

his evidence, that it was after he had lowered the semaphore and had come back to the crossing that he saw the fire and heard the fire truck coming from the west. He heard the whistle, saw the truck cross Maitland street going easterly on King street, and did not see it again until the collision. Counsel for Summers seemed to yield the point that the weight of evidence was to the effect that the semaphore was dropped before the switchman saw or heard the motor truck approaching. On the other hand, Mr. Meredith strongly urged that the evidence of several other witnesses, Heatherley, Britton, and Munnings, was the other way.

Aside from the question as to whether the switchman should not have lowered the semaphore, counsel for the plaintiffs urged that there was evidence to support the charge of negligence quite independent of that question. The case for the plaintiffs in outline is put in this way. Both the switchman and yardmen recognised it as their duty to clear the crossing for the expected motor truck. They all saw the truck and believed it to be going to the fire, as it was. Not having turned down Maitland street, it was to be expected that it would turn down William street, the next street; that the switchman and other men had lanterns in their hands; that they saw the train approaching; that danger was imminent, and that it was their duty to have done all that they reasonably could to prevent a collision; that this could easily have been prevented by the swinging of the lanterns that they had in their hands, and that rule 61 provides that when a light is swung across the track the train shall stop.

In my opinion, there was evidence of negligence in regard to the conduct of the employees which could not have been withdrawn from the jury, and it cannot be said as a matter of law that the answer to the third question does not amount to a finding of negligence. I am also of opinion that there was evidence of contributory negligence on the part of the City of London, through their servants who had charge of the motor truck, which could not be withdrawn from the jury. This does not apply to the plaintiff Summers, as the jury found that he could not, by the exercise of reasonable care, have avoided the accident and injury which happened to him. In short, I think all the find-

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ings of the jury are supported by the evidence and that the appeal by the Grand Trunk Railway Company against Summers should be dismissed with costs.

With respect to the appeal of the City of London there is the further question as to the admissibility of certain evidence and its effect upon the finding of contributory negligence on the part of the City of London. The evidence referred to I copy from the notes. The evidence objected to relates to an alleged order to the firemen, after the accident, by the chief, to stop the motor truck on approaching a railway crossing.

Q. What were the orders at the time of the accident in reference to approaching tracks—or were there any? A. I never heard of any.

Q. Did you hear of any orders being passed afterwards? A. I heard that they were passed.

Q. What were they?

Mr. Meredith: I object to that, my Lord.

Mr. Gibbons: I object to it also, your Lordship.

Mr. McCarthy: It is some evidence of what the city considered proper practice.

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Mr. Gibbons: Well, my Lord, I object to it.

Mr. Meredith: And I object to it, my Lord.

Mr. McCarthy: What were the orders? A. I understood they were, to stop at crossings.

His Lordship: Did you see them? A. No, sir.

Mr. Meredith: Then do not give evidence about them.

And again at p. 74:—

Q. Now then, since the happening of this accident they compel you to stop at all the crossings now?

Mr. Meredith: I object to that.

Witness: Yes.

His Lordship: He has answered it.

The order to the motor truck driver after the accident to stop at railway crossings was not evidence of antecedent negligence: Beven on Negligence, 3rd ed., p. 976; Phipson on Evidence, 4th ed., p. 116; and so inadmissible. Does it then afford a sufficient ground for a new trial under the facts and circumstances of this case? A new trial ought not to be granted on the ground of improper admission of evidence unless some substantial wrong or miscarriage of justice has been thereby occasioned: sec. 28 of the Judicature Act.

In the present case the trial Judge said during the course of the argument as to admitting the evidence: "I do not think that we have anything to do with orders made afterwards." And, when he allowed the question, he said: "I do not think it has much bearing upon the case."

The jury have made a strong finding as to what should have been done to avoid the collision. They say: "We are absolutely agreed that the firemen might have stopped the fire truck and made sure that the railway crossing was clear, knowing same crossing was a dangerous crossing, also knowing the railroad had the right of way."

Upon the whole evidence and circumstances of this case, I am unable to say that there was any substantial wrong or miscarriage of justice by reason of the improper admission of the evidence, and am of opinion that the appeal of the plaintiffs the City of London should be dismissed with costs.

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*In the first action, appeal dismissed; in the second action,
appeal allowed (CLUTE, J., dissenting.)*

APPENDIX

Cases reported in the Ontario Law Reports and in the Ontario Weekly Notes decided on appeal to the Judicial Committee of the Privy Council and the Supreme Court of Canada and reported since the publication of volume 31 of the Ontario Law Reports:—

CANADIAN NIAGARA POWER CO. AND TOWNSHIP OF STAMFORD, *Re*, 30 O.L.R. 384, affirmed by the Supreme Court of Canada: CANADIAN NIAGARA POWER CO. v. TOWNSHIP OF STAMFORD, 50 S.C.R. 168.

CARTWRIGHT v. CITY OF TORONTO, 29 O.L.R. 73, affirmed by the Supreme Court of Canada: CARTWRIGHT v. CITY OF TORONTO, 50 S.C.R. 215.

DAVIES AND JAMES BAY R.W. Co., *Re*, 28 O.L.R. 544, varied by the Judicial Committee of the Privy Council: DAVIES v. JAMES BAY R.W. Co., [1914] A.C. 1043.

ELECTRICAL DEVELOPMENT CO. OF ONTARIO AND TOWNSHIP OF STAMFORD, *Re*, 30 O.L.R. 391, affirmed by the Supreme Court of Canada: ELECTRICAL DEVELOPMENT CO. OF ONTARIO v. TOWNSHIP OF STAMFORD, 50 S.C.R. 168.

IMPERIAL PAPER MILLS OF CANADA LIMITED v. QUEBEC BANK, 26 O.L.R. 637, affirmed by the Judicial Committee of the Privy Council: IMPERIAL PAPER MILLS OF CANADA v. QUEBEC BANK, 83 L.J.P.C. 67, 110 L.T.R. 91.

LIDLAW AND CAMPBELLFORD LAKE ONTARIO AND WESTERN R.W. Co., *Re*, 31 O.L.R. 209, affirmed: CAMPBELLFORD LAKE ONTARIO AND WESTERN R.W. Co. v. LIDLAW, 50 S.C.R. 422 (note).

LONG v. TORONTO R.W. Co., 4 O.W.N. 741, reversed by the Supreme Court of Canada: LONG v. TORONTO R.W. Co., 50 S.C.R. 224.

MASSIE V. CAMPBELLFORD LAKE ONTARIO AND WESTERN R.W. Co., 6 O.W.N. 457, affirmed by the Supreme Court of Canada: CAMPBELLFORD LAKE ONTARIO AND WESTERN R.W. Co. v. MASSIE, 50 S.C.R. 409.

NELLES V. HESSELTINE, 3 O.W.N. 65, affirmed by the Supreme Court of Canada: HESSELTINE V. NELLES, 47 S.C.R. 230. The judgment of the Supreme Court affirmed by the Judicial Committee of the Privy Council, [1915] A.C. 355. See also NELLES V. HESSELTINE, 27 O.L.R. 97.

NORFOLK V. ROBERTS, 28 O.L.R. 593, affirmed by the Supreme Court of Canada: NORFOLK V. ROBERTS, 50 S.C.R. 283.

ONTARIO POWER CO. OF NIAGARA FALLS AND TOWNSHIP OF STAMFORD, *Re*, 30 O.L.R. 378, affirmed by the Supreme Court of Canada: ONTARIO POWER CO. OF NIAGARA FALLS V. TOWNSHIP OF STAMFORD, 50 S.C.R. 168.

PEARSON V. ADAMS, 28 O.L.R. 154, reversed by the Supreme Court of Canada, and judgment in 27 O.L.R. 87, restored: PEARSON V. ADAMS, 50 S.C.R. 204.

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1. *Action By, Begun before War—Residence in Hostile Country—Security for Costs—Stay of Proceedings—Dismissal of Action—Effect of.*]—The plaintiffs, residing in Austria and subjects of the Emperor of Austria, began this action before a state of war existed between the Emperor and his Britannic Majesty, and were ordered to give security for costs. Their solicitor, not being able to communicate with them after the war began, and no further proceedings having been taken, applied for an extension of time and for a stay of proceedings, in order to avoid the dismissal of the action which followed upon

failure to give security. This was refused; and it was held (upon an application in Chambers by the defendants), that the plaintiffs, having become alien enemies, ought to be barred from further prosecution of the action, which was dismissed; but, *semble*, the dismissal of the action at this stage would not be a bar to a subsequent action after the termination of the war.—*Le Bret v. Papillon* (1804), 4 East 502, and *Brandon v. Nesbitt* (1794), 6 T.R. 23, followed. *Dumenko v. Swift Canadian Co. Limited*, 87.

2. *Residence in Ontario—Action Begun before War—Right to Continue—Proclamation of August, 1914.*]—The plaintiffs, a widow and her children, in an action under the Fatal Accidents Act to recover damages for the death of O., the husband and father, by reason of the negligence of the defendants, or one of them, were subjects of the Emperor of Austro-Hungary, and were residing in Ontario, whither they had come with the deceased a short time before his death. The death occurred and the action was begun before war was declared between the Emperor and his Britannic Majesty:—*Held*, notwithstanding that the plaintiffs were alien enemies, that they were entitled to continue the action: they came within the terms of the Proclamation of the Governor-General of Canada of

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engaged in espionage or acts of a hostile nature, should be allowed the protection of the law:—*Quere*, whether the words “the protection of the law” referred to anything more than police protection.—And *held*, that, as the Court had no means of knowing whether the Proclamation covered this particular plaintiff, the action should be stayed until the plaintiff should satisfy the Court that it ought to allow him to proceed to trial, and there urge the contention that he was in Canada under what amounted to a license sufficient to enable him to sue on such a cause of action as he was setting up. *Bassi v. Sullivan*, 14.

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BANKS AND BANKING.

Winding-up of Bank before Commencement of Business—Contributories—Subscribers for Shares—Allotment by Provisional Directors—Implied Powers—Membership in Banking Corporation—Liability of Members to Contribute to Expenses—Adjustment inter se

*—Winding-up Act, R.S.C. 1906, ch. 144, secs. 2 (g), 51, 60, 93—Bank Act, R.S.C. 1906, ch. 29, secs. 11, 12, 13, 20, 34.]—The bank was incorporated on the 20th July, 1905, by the Dominion statute 4 & 5 Edw. VII. ch. 125; it never secured subscriptions for the amount of capital stock necessary to enable it to obtain the certificate of the Treasury Board to begin business; and a winding-up order was made on the 29th May, 1908. The four appellants, among others, signed applications under seal for shares, and promised to pay, in instalments, \$125 for each share of \$100 which the provisional directors might allot to them. To each of the appellants shares were allotted: one of them paid in full, one paid nothing, and the other two each paid part of the price:—*Held*, that the provisional directors had power to allot shares and to make the subscribers members of the corporation; and the names of all the appellants were properly placed upon the list of contributories in the winding-up—although they never became “shareholders;” there being no question of double liability, the name of the appellant who had paid in full was placed upon the list in order that he might receive what he had paid over and above his proper share.—Sections 2 (g), 51, 60, and 93 of the Winding-up Act, R.S.C. 1906, ch. 144, and secs. 11, 12, 13, 20, and 34 of the Bank Act, R.S.C. 1906, ch. 29, considered.—The rule as to implied powers—that where a certain*

result is authorised to be attained, and the means are not clearly indicated, the power of doing all such acts, or employing such means, as are necessary to its execution, is impliedly granted—applied.—Judgment of Middleton, J., affirmed. *Re Monarch Bank of Canada*, 207.

See PROMISSORY NOTE.

BIAS.

See LANDLORD AND TENANT, 1.

BILLS AND NOTES.

See LIMITATION OF ACTIONS, 2
—PROMISSORY NOTE.

BILLS OF EXCHANGE ACT.

See PROMISSORY NOTE.

BILLS OF SALE.

See CHATTEL MORTGAGE.

BUILDINGS.

See CONTRACT, 1—LANDLORD AND TENANT, 1.

BY-LAWS.

See HIGHWAY, 1—MUNICIPAL CORPORATIONS — STREET RAILWAYS.

CARRIERS.

Carriage of Perishable Goods—Wrongful Delivery—Breach of Contract—Action by Vendor against Carriers—Damages—Deprivation of Control—Loss of Market—Rejection of Goods by Purchaser—Nominal Damages—Reference—Costs.]—The plaintiffs on the 14th February shipped 300 cases of eggs from Owen Sound to Toronto by the defendants'

railway, consigned to the order of a bank at Toronto, for the H. company. By the contract between the plaintiffs and the H. company, the eggs were to be "same as sample," "f.o.b. Owen Sound." A bill of lading was delivered to the plaintiffs by the defendants, and this with a draft on the H. company for the price was sent to the bank. The eggs arrived in Toronto, presumably on the 15th, which was a Saturday, and the car containing them was put on the H. company's siding, where it was found by the company on Monday the 17th February, and the eggs were on that day unloaded into the company's cold storage warehouse. No draft or bill of lading had then reached the company, and the contract contained nothing about the time of payment. On the 18th February, the draft was presented to the company by the bank with the bill of lading attached, and the draft was left with the company, but not the bill of lading. The company then examined the eggs, and, finding them not up to sample, condemned them, and so notified the defendants (the carriers), but did not notify the plaintiffs until the 20th. On the 21st, the plaintiffs inspected the eggs, and agreed that they were not up to sample, but refused to reload them or do anything with them, although the defendants offered them the eggs free from any claim; and the eggs remained with the company in cold storage until the 20th March, when they were sold by the defendants for

unpaid charges. This action was brought for damages for wrongful delivery of the eggs; the defendants brought into Court the amount realised by the sale, less their charges:—*Held*, that if a legal right is invaded or a contract broken, the person injured thereby may maintain an action, notwithstanding that no real damage is shewn; and the plaintiffs were entitled to maintain that the taking of the eggs into the H. company's warehouse on the 17th February was a wrongful delivery, contrary to the bill of lading, and were entitled to recover, not the value of the eggs, but the damages sustained by the wrongful act, *i.e.*, their real loss caused by the deprivation of control over the eggs from the 18th February, when the H. company inspected and rejected, until the 21st February, when the plaintiffs' control was re-established, if they chose to exercise it. — *Sanquer v. London and South-Western R.W. Co.* (1855), 16 C.B. 163, and *Hiort v. London and North-Western R.W. Co.* (1879), 4 Ex.D. 188, applied and followed.—*Held*, as to the damages, that the question was, whether the eggs could have been sold on the 18th February for a better price than on the 21st, and for more than they actually realised; and, as the plaintiffs at the trial did not adduce evidence upon this point—although they gave some evidence as to damage—they should have, at their own expense, if they so elected, a reference as to damages upon this basis; and, if they did not

so elect, should have (in addition to the money paid into Court) judgment for nominal damages, with costs on the Division Court scale, without set-off. — Judgment of FALCONBRIDGE, C.J.K.B., reversed. *Lemon v. Grand Trunk R.W. Co.*, 37.

See RAILWAY, 2.

CASES.

Allen v. Dundas (1789), 3 T.R. 125, followed.]—See TITLE TO LAND.

Andrews v. Ramsay, [1903] 2 K.B. 635, distinguished.]—See PRINCIPAL AND AGENT.

Atkinson v. City of Chatham (1899), 26 A.R. 521, specially referred to.]—See HIGHWAY, 2.

Bannister v. Thompson (1913), 29 O.L.R. 562, varied.]—See HUSBAND AND WIFE.

Bell Telephone Co. v. City of Chatham (1900), 31 S.C.R. 61, specially referred to.]—See HIGHWAY, 2.

Bell Telephone Co. v. City of Chatham (1900), 31 S.C.R. 61, distinguished.]—See WATER.

Bergklint v. Western Canada Power Co. (1914), 50 S.C.R. 39, 67, referred to and explained.]—See MASTER AND SERVANT, 1, 3.

Brandon v. Nesbitt (1794), 6 T.R. 23, followed.]—See ALIEN ENEMY, 1.

Britannic Merthyr Coal Co. v. Daird, [1910] A.C. 74, specially referred to.]—See MINES AND MINERALS.

Burchell v. Gowrie and Blockhouse Collieries Limited, [1910] A.C. 614, applied.]—See PRINCIPAL AND AGENT.

Butler v. Fife Coal Co., [1912] A.C. 149, specially referred to.]—*See* MINES AND MINERALS.

Campbell v. Fleming (1834), 1 A. & E. 40, distinguished.]—*See* FRAUD AND MISREPRESENTATION.

Cameron v. Bradbury (1862), 9 Gr. 67, applied.]—*See* JUDGMENT, 1.

Canadian Northern R.W. Co. v. Robinson (1910), 43 S.C.R. 387, [1911] A.C. 739, distinguished.]—*See* RAILWAY, 1.

Chambers v. Goldthorpe, [1901] 1 K.B. 624, distinguished.]—*See* CONTRACT, 1.

Chapman v. McEwen (1905), 6 O.W.R. 164, approved.]—*See* DITCHES AND WATERCOURSES ACT.

Citizens' Light and Power Co. v. Lepitre (1898), 29 S.C.R. 1, referred to.]—*See* MASTER AND SERVANT, 3.

Clements v. Ohrly (1847), 2 C. & K. 686, considered.]—*See* MALICIOUS PROSECUTION.

Clergue v. H. H. Vivian & Co. (1909), 41 S.C.R. 607, referred to.]—*See* JUDGMENT, 1.

Cole v. Racine (1913), 4 O.W.N. 1327, followed.]—*See* CHATEL MORTGAGE.

Consumers Gas Co. v. City of Toronto (1897), 27 S.C.R. 453, followed.]—*See* MUNICIPAL CORPORATIONS, 2.

Cook v. Grand Trunk R.W. Co. (1914), 31 O.L.R. 183, distinguished.]—*See* RAILWAY, 5.

Cooke v. Midland Great Western Railway of Ireland, [1909] A.C. 229, distinguished.]—*See* NEGLIGENCE, 1.

Crane v. Craig (1886), 11 P.R. 236, approved.]—*See* INFANT, 2.

Dansey v. Richardson (1854), 3 E. & B. 144, specially referred to.]—*See* INNKEEPER, 1.

Deyo v. Kingston and Pembroke R.W. Co. (1904), 8 O.L.R. 588, distinguished.]—*See* RAILWAY, 5.

Dysart, Earl, v. Hammerton & Co., [1914] 1 Ch. 822, followed.]—*See* COVENANT.

Edinburgh, City of, v. North British R.W. Co., Princes' Street Gardens Arbitration (1892), Hudson on Compensation, p. 1530, applied.]—*See* RAILWAY, 4.

Fahey v. Jephcott (1901), 2 O.L.R. 449, distinguished.]—*See* MUNICIPAL CORPORATIONS, 1.

Falconer v. The Queen (1859), 2 Can. Ex. C.R. 82, followed.]—*See* RAILWAY, 3.

Farrar v. Farrars Limited (1888), 40 Ch.D. 395, specially referred to.]—*See* PARTNERSHIP.

Fawcett v. Canadian Pacific R.W. Co. (1901-2), 8 B.C.R. 393, 32 S.C.R. 721, distinguished.]—*See* RAILWAY, 5.

Fort Frances Assessment, Re (1913), 27 O.L.R. 622, referred to.]—*See* ONTARIO RAILWAY AND MUNICIPAL BOARD.

Fowell v. Grafton (1910), 22 O.L.R. 550, distinguished.]—*See* MUNICIPAL CORPORATIONS, 1.

Fowler and Village of Waterdown, Re (1914), 7 O.W.N. 309, followed.]—*See* MUNICIPAL CORPORATIONS, 3.

Fraser v. Ryan (1897), 24 A.R. 441, applied.]—*See* JUDGMENT, 1.

Gibbon v. Michael's Bay Lumbar Co. (1885), 7 O.R. 746, followed.]—*See* CONTRACT, 2.

Gibbons v. Cozens (1898), 29 O.R. 356, applied.]—See JUDGMENT, 1.

Gibson and City of Toronto, Re (1913), 28 O.L.R. 20, applied and followed.]—See LANDLORD AND TENANT, 1.

Goodfellow v. Rannie (1873), 20 Gr. 425, approved.]—See INFANT, 2.

Goodrich v. Bodurtha (1856), 72 Mass. (6 Gray) 323, followed.]—See MUNICIPAL CORPORATIONS, 3.

Grand Trunk R.W. Co. v. Birkett (1904), 35 S.C.R. 296, distinguished.]—See RAILWAY, 5.

Grant v. Acadia Coal Co. (1902), 32 S.C.R. 427, specially referred to.]—See MINES AND MINERALS.

Grant v. Canadian Pacific R.W. Co. (1904), 36 N.B.R. 528, distinguished.]—See RAILWAY, 1.

Greaves v. Tofield (1880), 14 Ch.D. 563, followed.]—See VENDOR AND PURCHASER, 3.

Greer v. Canadian Pacific R.W. Co. (1914), 31 O.L.R. 419, affirmed.]—See RAILWAY, 1.

Grove, In re (1880), 40 Ch.D. 216, specially referred to.]—See DOMICILE.

Hagle v. Laplante (1910), 20 O.L.R. 339, distinguished.]—See MUNICIPAL CORPORATIONS, 1.

Hanson v. Lancashire and Yorkshire R.W. Co. (1870), 20 W.R. 297, distinguished.]—See MASTER AND SERVANT, 2.

Hartcup & Co. v. Bell (1883), Cab. & El. 19, followed.]—See LANDLORD AND TENANT, 2.

Haywood v. Hamilton Bridge Works Co. Limited (1914), 7

O.W.N. 231, distinguished.]—See MASTER AND SERVANT, 2.

Hiort v. London and South-Western R.W. Co. (1879), 4 Ex.D. 188, applied and followed.]—See CARRIERS.

Hippisley v. Knee Brothers, [1905] 1 K.B. 1, applied.]—See PRINCIPAL AND AGENT.

Holder v. Soulbey (1860), 29 L.J.N.S.C.P. 248, 8 C.B.N.S. 254, specially referred to.]—See INNKEEPER, 1.

Holmes v. Blogg (1817), 8 Taunt. 35, 2 J. B. Moore 552, approved and applied.]—See INFANT, 1.

Hoop, The (1799), 1 C. Rob. 196, 201, followed.]—See ALIEN ENEMY, 3.

Huffman v. Walterhouse (1890), 19 O.R. 186, approved.]—See INNKEEPER, 2.

Huntly, Marchioness of, v. Gaskell, [1905] 2 Ch. 656, 667, followed.]—See MUNICIPAL CORPORATIONS, 3.

Irwin and Campbell, Re (1913), 4 O.W.N. 1562, 5 O.W.N. 229, followed.]—See LANDLORD AND TENANT, 1.

Jackson ex dem. Miner v. Boneham (1818), 15 Johns. (N.Y.) 226, approved and followed.]—See INSURANCE.

Jacobs v. Booth's Distillery Co. (1901), 85 L.T.R. 262, referred to.]—See JUDGMENT, 2.

Jameson v. Simon (1899), 1 F. (Ct. of Sess. Cas., 5th series) 1211, followed.]—See CONTRACT, 1.

Janson v. Dreifontein Consolidated Mines Limited, [1902] A.C. 484, 499, followed.]—See ALIEN ENEMY, 3.

Jones v. Festiniog R.W. Co. (1868), L.R. 3 Q.B. 733, applied.]

—See NUISANCE.

Knox v. Gye (1872), L.R. 5 H.L. 656, specially referred to.]—See PARTNERSHIP.

Lamond v. Richard, [1897] 1 Q.B. 541, specially referred to.]—See INNKEEPER, 1.

Latham v. R. Johnson & Nephew Limited, [1913] 1 K.B. 398, referred to.]—See NEGLIGENCE, 1.

Lawless v. Chamberlain (1889), 18 O.R. 296, not followed.]—See MARRIAGE.

Le Bret v. Papillon (1804), 4 East 502, followed.]—See ALIEN ENEMY, 1.

Livingston v. Livingston (1912), 26 O.L.R. 246, varied.]—See PARTNERSHIP.

Longdon v. Bilsky (1910), 22 O.L.R. 4, followed.]—See MALICIOUS PROSECUTION.

Lovegrove v. London Brighton and South Coast R.W. Co. (1864), 16 C.B.N.S. 669, 691, 692, specially referred to.]—See MASTER AND SERVANT, 1.

Lucas and Chesterfield Gas and Water Board, In re, [1909] 1 K.B. 16, applied and followed.]—See LANDLORD AND TENANT, 1.

McArthur v. Dominion Cart-ridge Co., [1905] A.C. 72, specially referred to and distinguished.]—See MASTER AND SERVANT, 1, 5.

McCallum v. Grand Trunk R.W. Co. (1870-1), 30 U.C.R. 122, 31 U.C.R. 527, followed.]—See RAILWAY, 1.

McGillivray v. Township of Lochiel (1904), 8 O.L.R. 446, ex-

plained.]—See DITCHES AND WATERCOURSES ACT.

Macpherson and City of Toronto, Re (1895), 26 O.R. 558, approved and followed.]—See RAILWAY, 3.

McPherson v. United States Fidelity and Guaranty Co. (1914), 6 O.W.N. 677, applied.]—See JUDGMENT, 1.

Martin, In re, Loustalan v. Loustalan, [1900] P. 211, specially referred to.]—See DOMICILE.

Matthews, In the Goods of, [1898] P. 17, referred to.]—See TITLE TO LAND.

Mills v. Armstrong (1888), 13 App. Cas. 1, referred to.]—See RAILWAY, 6.

Montgomery v. Ruppensburg (1899), 31 O.R. 433, approved and followed.]—See VENDOR AND PURCHASER, 3.

Moore v. McGlynn, [1894] 1 I.R. 74, applied.]—See TRUSTS AND TRUSTEES.

Morrison v. Universal Marine Insurance Co. (1872-3), L.R. 8 Ex. 40, 197, followed.]—See FRAUD AND MISREPRESENTATION.

Murphy v. Lamphier (1914), 31 O.L.R. 287, affirmed.]—See WILL.

Newcombe v. Anderson (1885), 11 O.R. 665, 682, approved.]—See INNKEEPER, 2.

Nitedals Taendstikfabrik v. Bruster, [1906], 2 Ch. 671, applied.]—See PRINCIPAL AND AGENT.

Omnium Electric Palaces Limited v. Baines, [1914] 1 Ch. 322, specially referred to.]—See PARTNERSHIP.

- Parsons v. Brand* (1890), 25 Q.B.D. 110, followed.]—See CHATTEL MORTGAGE.
- Pedlar v. Toronto Power Co.* (1913-14), 29 O.L.R. 527, 30 O.L.R. 581, referred to.]—See NEGLIGENCE, 1.
- Pennock v. Mitchell* (1908) 17 O.L.R. 286, approved.]—See WATER.
- Prendergast v. Grand Trunk R. W. Co.* (1866), 25 U.C.R. 193, distinguished.]—See RAILWAY, 1.
- Ram Coomar Coondée v. Chunder Canto Mookerjee* (1876), 2 App. Cas. 186, 209, followed.]—See SOLICITOR.
- Regina v. Buffalo and Lake Huron R.W. Co.* (1864), 23 U.C.R. 208, followed.]—See RAILWAY, 3.
- Regina v. Burrow, Metropolitan R.W. Co. v. Burrow* (1884), London Times 24th January and 22nd November, 1884, Boyle and Waghorn on Compensation, p. 1052, and Hudson on Compensation, p. 1521, applied.]—See RAILWAY, 4.
- Regina v. Carrier* (1888), 2 Can. Ex. C.R. 36, followed.]—See RAILWAY, 3.
- Regina v. Chapman* (1838), 8 C. & P. 558, explained.]—See CRIMINAL LAW, 3.
- Regina v. Keeler* (1877), 7 P.R. 117, followed.]—See CRIMINAL LAW, 3.
- Regina v. Mullady* (1868), 4 P.R. 314, followed.]—See CRIMINAL LAW, 3.
- Rimington v. Hartley* (1880), 14 Ch.D. 630, followed.]—See DITCHES AND WATERCOURSES ACT.
- Robinson v. Cummings* (1742), 2 Atk. 409, considered.]—See GIFT.
- Rogers v. James* (1891), 8 Times L.R. 67, followed.]—See CONTRACT, 1.
- Royal Electric Co. v. Hévé* (1902), 32 S.C.R. 462, referred to.]—See MASTER AND SERVANT, 3.
- Ryan v. Whelan* (1901), 21 C.L.T. Occ. N. 406, considered.]—See GIFT.
- Ryckman v. Hamilton Grimsby and Beamsville Electric R.W. Co.* (1905), 10 O.L.R. 419, 427, distinguished.]—See RAILWAY, 1.
- Rylands v. Fletcher* (1868), L. R. 3 H.L. 330, applied.]—See MASTER AND SERVANT, 3.
- Sanquer v. London and South-Western R.W. Co.* (1855), 16 C.B. 163, applied and followed.]—See CARRIERS.
- Scarborough v. Cosgrove*, [1905] 2 K.B. 805, specially referred to.]—See INNKEEPER, 1.
- Scott v. London and St. Katherine Docks Co.* (1865), 3 H. & C. 596, 601, 140 R.R. 627, 631, followed.]—See MASTER AND SERVANT, 2.
- Scott v. Ratliffe* (1831), 5 Peters 80, 85, approved and followed.]—See INSURANCE.
- Sherwood v. City of Hamilton* (1875), 37 U.C.R. 410, followed.]—See WATER.
- Shipman v. Phinn* (1914), 31 O.L.R. 113, affirmed.]—See SHIP.
- Smith v. Baker & Sons*, [1891] A.C. 325, 362, specially referred to and applied.]—See MASTER AND SERVANT, 1, 5.
- Stewart v. Taggart* (1872), 22 U.C.C.P. 284, approved.]—See LIMITATION OF ACTIONS, 1.

Stone v. Canadian Pacific R.W. Co. (1913), 47 S.C.R. 634, followed.]—See RAILWAY, 5.

Strange v. Brennan (1846), 2 Coop. temp. Cott. 1, not followed.]—See SOLICITOR.

Taylor v. Stibbert (1794), 2 Ves. Jr. 437, followed.]—See VENDOR AND PURCHASER, 3.

Thornbury Case, The, Ackers v. Howard (1886), 16 Q.B.D. 739, distinguished.]—See PARLIAMENTARY ELECTIONS.

Thorogood v. Bryan (1849), 8 C.B. 115, referred to as overruled.]—See RAILWAY, 6.

Thurn and Taxis, Princess, v. Moffitt, [1914] W.N. 379, followed.]—See ALIEN ENEMY, 2.

Tomlinson v. Hill (1855), 5 Gr. 231, approved and applied.]—See LIMITATION OF ACTIONS, 1.

Toronto, City of, v. Grand Trunk R.W. Co. and Canadian Pacific R.W. Co. (1910), 11 Can. Ry. Cas. 365, considered.]—See RAILWAY, 2.

Toulmin v. Millar (1887), 58 L.T.R. 96, applied.]—See PRINCIPAL AND AGENT.

Truman v. Rudolph (1895), 22 A.R. 250, distinguished.]—See RAILWAY, 5.

Udny v. Udny (1869), L.R. 1 Sc. App. 441, specially referred to.]—See DOMICILE.

Walls v. Atcheson (1826), 3 Bing. 462, followed.]—See LANDLORD AND TENANT, 2.

Wells v. Williams (1698), 1 Ld. Raym. 282, 1 Salk. 46, followed.]—See ALIEN ENEMY, 3.

West v. Bristol Tramways Co., [1908] 2 K.B. 14, applied.]—See NUISANCE.

Wigtown Case, The (1874), 2

O'M. & H. 215, 223, followed.]—See PARLIAMENTARY ELECTIONS.

Wild v. Waygood, [1892] 1 Q.B. 783, followed.]—See MASTER AND SERVANT, 4.

Wilson v. Kearse (1800), Peake Add. Cas. 196, approved and applied.]—See INFANT, 1.

Winnipeg Electric R.W. Co. v. Schwartz (1913), 49 S.C.R. 80, distinguished.]—See MASTER AND SERVANT, 5.

Winsmore v. Greenbank (1745), Willes 577, followed.]—See HUSBAND AND WIFE.

Winstone, In the Goods of, [1898] P. 143, referred to.]—See TITLE TO LAND.

CERTIORARI.

See CRIMINAL LAW, 1.

CHAMPERTY.

See SOLICITOR.

CHATTEL MORTGAGE.

Affidavit of Execution—Omission of Date—Bills of Sale and Chattel Mortgage Act, R.S.O. 1914, ch. 135, sec. 5.—Where the affidavit of execution of a chattel mortgage does not state the day of the month upon which the mortgage was executed, as required by sec. 5 of the Bills of Sale and Chattel Mortgage Act, R.S.O. 1914, ch. 135, the mortgage is invalid as against the assignee for the benefit of the creditors of the mortgagor.—*Cole v. Racine* (1913), 4 O.W.N. 1327, and *Parsons v. Brand* (1890), 25 Q.B.D. 110, followed. *Martin v. Shapiro*, 640.

See INJUNCTION.

COLLATERAL SECURITY.

See PROMISSORY NOTE.

COLLISION.

See RAILWAY, 6—SHIP.

COMMISSION.

See PRINCIPAL AND AGENT.

COMMON EMPLOYMENT.

See MASTER AND SERVANT, 1.

COMPANY.

Action against Directors—Ontario Companies Act, 2 Geo. V. ch. 31, sec. 96—Enforcement of Judgment for Wages—Discontinuance against One Director Resident out of the Jurisdiction—Joint and Several Liability—Practice—Parties—Non-joinder—Contribution—Rules 67, 134, 165.]—In this action the plaintiff sought payment from the several defendants, as directors of an incorporated company, of the amount of a judgment recovered by him against the company for wages due to him as a workman employed by the company. The action was begun within a year from the time that the defendants ceased to be directors; but, after the expiration of the year, it was discontinued against the defendant K., who was a resident of a foreign country:—*Held*, that, as the liability of the defendants as directors, under sec. 96 of the Ontario Companies Act, 2 Geo. V. ch. 31, was several as well as joint, the plaintiff was entitled to sue them separately, and was not bound to join all of them as

defendants; he was entitled also, under Rule 67, to sue one or more or all of them in the same action.—The defendant K. was not a necessary party to an action to enforce the several liability of the directors; nor, if the liability had been joint only, could the other defendants have succeeded in a motion under Rule 134 to add K. as one who ought to have been joined as a defendant, he not being within the jurisdiction.—Rule 134 applies only in the case of a person who ought to have been joined or whose presence is necessary in order to enable the Court effectually and completely to adjudicate upon the questions involved; and, K. not being a necessary party, the other defendants would not have been entitled to insist upon his being added as a defendant for the purpose of claiming contribution against him, and so were not prejudiced by the course taken by the plaintiff in first joining K. and then discontinuing against him after the year mentioned in sec. 96 had elapsed; the other defendants, if they desired contribution from K., could invoke the third party procedure, Rule 165.—Judgment of the District Court of the District of Nipissing, affirmed. *Reuckwald v. Murphy*, 133.

See TRUSTS AND TRUSTEES.

COMPENSATION.

See MUNICIPAL CORPORATIONS, 2—PARTNERSHIP—RAILWAY, 3, 4.

CONDITIONAL PROMISE.

See GIFT.

CONSOLIDATION OF ACTIONS.

See CONTRACT, 1.

CONSTITUTIONAL LAW.

Schools Laws of Ontario—Roman Catholic Separate Schools—English-French Schools—Regulations of Department of Education—Intra Vires—“Denominational Schools”—French-Canadian Supporters—“Class of Persons”—Right or Privilege Existing at Time of Union not Prejudicially Affected—Violation of Regulations—Unauthorised Use of French Language—Employment of Unqualified Teachers—Preventing Inspection—Delegation of Powers of Board—Ultra Vires—Declaration—Injunction—Mandamus—Costs—Damages.]—By sec. 93 of the British North America Act, 1867, in and for each Province the Legislature may exclusively make laws in relation to education; but, sub-sec. 1, nothing in any such law shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons have by law in the Province at the Union:—*Held*, that this is a distinct and positive limitation upon legislative action; and, subject to this limitation only—and in default of the exercise of federal jurisdiction under sub-secs. 3 and 4—the unfettered direction and control of education within the Province is committed to the Provincial Legislature.—(2) That Roman Catholic separate schools

in Ontario are “denominational schools” and the French-Canadian supporters of the separate and public schools of Ontario are a “class of persons,” within the meaning of sub-sec. 1.—(3) That the defendants, the Board of Trustees of the Roman Catholic Separate Schools for the City of Ottawa, had failed to shew that the Instructions issued in June, 1912, and August, 1913, by the Ontario Department of Education in regard to English-French Public and Separate Schools, or the manner in which those Instructions had been or were being administered by the Department, “prejudicially affected any right or privilege with respect to denominational schools” which the defendants or the French-Canadian supporters of the Separate schools had “by law in the Province at the Union;” and it did not appear that these Instructions or the manner of their administration or the statutes upon which they were founded were *ultra vires* of the Provincial Legislature.—(4) That the defendants, upon the evidence, had disregarded and disobeyed the regulations of the Department, by the unauthorised use of the French language in their schools, by the employment of unqualified teachers, by preventing the inspection of the schools by the authorised inspectors, and in other ways.—(5) That the resolutions of the defendants (the Board) purporting to delegate to the Chairman of the Board power to discharge, select, and engage teachers, were

ultra vires.—The plaintiffs, who were ratepayers of the city and supporters of separate schools for Roman Catholics, some of them being members of the Board, who had objected to the resolutions and other acts of the Board contrary to the Regulations of the Department, but were in a minority, were given relief by way of declaration, injunction, and mandamus, with costs against the Board; but the Court refused to penalise the majority members of the Board by making them personally liable for costs and damages. *Mackell v. Ottawa Separate School Trustees*, 245.

CONTINGENT FEE.

See SOLICITOR.

CONTRACT.

1. *Breach—Defective Material Used in Building by Contractor—Want of Supervision by Architect—Right of Action against—Implied Contract—Separate Actions by Building Owner against Contractor and Architect—Actions Tried together and Consolidated—Judgment against both Defendants for same Sum—Damages—Separate Contracts—Merger of Cause of Action in Judgment—Consolidation Order—Variation—Joinder of Parties—Rules 67, 134, 320—Rights of Defendants inter se.*—The plaintiffs employed a firm of architects to draw plans and specifications for a building and to superintend the construction thereof; and entered into a contract with a firm of builders to erect the building. The plaintiffs

brought an action against the builders for breach of the building contract by placing defective materials in the building, and another action against the architects for negligence in supervising the construction by reason of which the defective material was not condemned. The actions were begun on the same day. There was a written contract with the builders, but not with the architects:—*Held*, that the architects failed to perform their elementary duty to exercise a sufficient supervision over the building, and so broke the contract implied from their employment; damage followed the breach immediately, by the builders placing defective materials in the building; and for this an action lay against the architects.—*Chambers v. Goldthorpe*, [1901] 1 K.B. 624, distinguished.—*Rogers v. James* (1891), 8 Times L.R. 67, and *Jamesson v. Simon* (1899), 1 F. (Ct. of Sess. Cas., 5th series) 1211, followed.—The two actions were consolidated by the trial Judge, and tried as one action, and judgment was given against the defendants (*i.e.*, both sets of defendants) for one sum of money as damages. Upon appeals by both sets of defendants, the builders admitted their liability, and complained only of the quantum of the damages, while the architects contended that the plaintiffs were bound to elect which set of defendants they would sue, and that a judgment against the builders would bar an action against the architects:

—*Held*, that the two contracts were separate and distinct; the builders broke theirs when they put bad material into the building; at the same moment the architects broke theirs when they allowed this to be done; the damages were the same under either contract, but that was immaterial; the contracts were not the same; if judgment were obtained in the action against the builders, it would destroy their contract *quoad hoc*, but it could not affect the contract of the architects—that *non transivit in rem judicatam*, but remained a simple contract; therefore, the plaintiffs were entitled to judgment against both sets of defendants, and the judgment appealed from was right.—*Semble*, that, if the full amount of the damages were realised out of the builders, no action (except, perhaps for nominal damages) would lie against the architects—but that would be because the plaintiffs had suffered no damage from the default of the architects.—Discussion of the rule of law that where a judgment is obtained every cause of action upon which the judgment is based *transit in rem judicatam*, and review of the authorities.—*Held*, that the judgment was technically wrong in “consolidating” the actions: in strictness actions can be consolidated only when they are between the same parties; and it is in this sense that Rule 320 provides for consolidation by order of the Court.—The actions were begun before the present Rule 67 came into force; had they been

begun after that Rule had become effective, the builders and architects might have been joined as defendants in one action; and, that being so, Rule 134 empowered the Court to add either set of defendants as defendants in one of the actions, and dispose of all matters therein, staying the other action; and the judgment should be varied by so providing, unless all parties agreed to another course which was suggested. In either case, the rights of the defendants *inter se* should be reserved. *Campbell Flour Mills Co. Limited v. Bowes, Campbell Flour Mills Co. Limited v. Ellis*, 270.

2. *Rent of Plant at Sum per Diem—Computation of Days—Construction of Written Agreement—Inclusion of Sundays.*—The plaintiff rented to the defendants a certain plant; the rental stipulated in the written agreement was \$62 per day, “to start immediately on outfit leaving main line and to run each and every day until the work is complete:”—*Held* (CLUTE, J., dissenting), that, in computing the number of days to be paid for, Sundays were to be included.—The provision in the contract “one day to constitute ten hours” was for the purpose of determining what should be paid in the event of the plant being worked longer than ten hours.—Judgment of MIDDLETON, J., following *Gibbon v. Michael's Bay Lumber Co.* (1885), 7 O.R. 746, affirmed.—*Per* CLUTE, J.:—Where a contract is open to two con-

structions, one of which contravenes a public statute and the other does not, it should be assumed that the parties did not intend to commit a breach of the law. The provisions of the agreement shewed that whatever days or parts of days were to be paid for were those days on which work could be done. *Perry v. Brandon*, 94.

See CARRIERS—COVENANT—FRAUD AND MISREPRESENTATION—INFANT, 1—JUDGMENT, 1—LANDLORD AND TENANT—PRINCIPAL AND AGENT—RAILWAY, 2—SOLICITOR—STREET RAILWAYS—VENDOR AND PURCHASER.

CONTRIBUTION.

See COMPANY.

CONTRIBUTORIES.

See BANKS AND BANKING.

CONTRIBUTORY NEGLIGENCE.

See HIGHWAY, 2—MASTER AND SERVANT, 4—MINES AND MINERALS—RAILWAY, 5, 6—WATER.

CONVICTION.

See CRIMINAL LAW.

COSTS.

See ALIEN ENEMY, 1—CARRIERS—CONSTITUTIONAL LAW—COVENANT—HIGHWAY, 1—INFANT, 2—JUDGMENT, 1—LAND TITLES ACT—LANDLORD AND TENANT, 2—MALICIOUS PROSECUTION—MUNICIPAL CORPORATIONS, 1—SOLICITOR—TITLE TO LAND—VENDOR AND PURCHASER, 2, 3—WILL.

COVENANT.

Restraint of Trade—Undertaking not to Enter into Competition with Established Business—Business Carried on under Management of Covenantor—Breach of Covenant—Interim Injunction—Scope and Form of—Appeal—Costs.]—The defendant, who had been employed as a manager in the plaintiffs' business of dyeing and cleaning, when leaving their employment, entered into an agreement with them, whereby, for a recited consideration, she covenanted with them that she would not "either alone or jointly with or as agent or otherwise for any other person, firm, or company, directly or indirectly enter into competition with or opposition to the business of" the plaintiffs "within the Province of Ontario for a period of three years from the date of this agreement." Shortly after the making of this agreement, a business which admittedly competed with the business of the plaintiffs was commenced and carried on in the city of Toronto ostensibly by a daughter of the defendant, and the business was advertised to the public as under the management of the defendant:—*Held*, affirming the decision of LATCHFORD, J., upon a motion for an interim injunction, that the evidence before the Court warranted the conclusion that the business was being carried on under the management of the defendant; and that constituted a breach of her covenant.—The order of LATCHFORD, J., restrained the defendant until the trial of the

action "from entering into or continuing in business as a dyer and cleaner . . . in the Province of Ontario, and from entering into competition with or opposition to the business carried on by the plaintiffs . . . either alone or jointly with or as agent or otherwise for any other person, firm, or company, directly or indirectly:"—*Held*, that the injunction was properly granted in general terms, without specifying the acts from the doing which it was intended that it should restrain the defendant.—*Earl Dy-sart v. Hammerton & Co.*, [1914] 1 Ch. 822, followed.—*Held*, however, that the order was too wide, and the first part, which restrained the defendant "from entering into or continuing in business as a dyer and cleaner," should be struck out.—*Held*, also, HODGINS, J.A., dissenting, that the defendant should pay the costs of her appeal.—*Per* Hodgins, J.A.:—It is open to question whether the covenant is broken by the defendant engaging as manager in a business which itself competes with that of the plaintiffs. Does she herself compete, or is it the business, which she does not carry on, which itself competes, with the plaintiffs' undertaking? The plaintiffs should undertake to bring the action to a speedy trial, and the costs of the appeal should abide the result of the trial. *Parkers Dye Works Limited v. Smith*, 169.

See LANDLORD AND TENANT, 1.

CRIMINAL LAW.

1. *Conviction—Motion for Writ of Certiorari—Rules of Supreme Court of Ontario, 1908—Power to Abolish Writ of Certiorari—Criminal Code, sec. 576.*—The power to make Rules of Court "for regulating in criminal matters the pleading, practice and procedure in the Court, including the subjects of mandamus, certiorari," etc., conferred upon the Supreme Court of Ontario by sec. 576 of the Criminal Code, R.S.C. 1906, ch. 146, authorises the making of the Rules of 1908, whereby the writ of certiorari was abolished, and another mode of bringing the proceedings of inferior tribunals in criminal matters before the Supreme Court was substituted. *Certiorari* is not, though the writ is, abolished.—Order of MEREDITH, C.J.C.P., refusing (but with doubt) an application for a writ of certiorari to remove a criminal conviction into the Supreme Court, affirmed. *Rex v. Titchmarsh*, 569.

2. *Indecent Assault—Evidence—Criminal Code, sec. 292.*—There may be a conviction for an indecent assault (Criminal Code, sec. 292) although the act constituting the assault is not in its nature indecent. An ambiguous act may be interpreted by the surrounding circumstances and by words spoken at the time. And so, where a man took hold of a girl against her will and at the same time offered her money and invited her to go with him for an immoral purpose, a conviction

for an indecent assault was sustained. *Rex v. Louie Chong*, 66.

3. *Murder — Application for Bail after True Bill Found—Postponement of Trial at Instance of Crown.*—The single proper purpose of detaining an accused person in close custody is to insure his trial in due course; and in all applications for bail, resting in the discretion of a Court or of a judicial officer, in criminal cases, the paramount question should be, whether the presence of the accused person for trial in due course would be assured if the application were granted.—The circumstances to be taken into consideration pointed out.—And in this case, where a true bill had been found against the accused, who was charged with murder, although his trial had been postponed at the instance of the Crown, he being ready for trial, and although it was represented by counsel for the accused that the case for the Crown was not a strong one, bail was, having regard to all the circumstances, refused.—There is, however, no hard and fast rule that in a case of murder, the accused will not, after bill found, be admitted to bail.—*Regina v. Chapman* (1838), 8 C. & P. 558, explained.—*Regina v. Keeler* (1877), 7 P.R. 117, and *Regina v. Mullady* (1868), 4 P.R. 314, followed. *Rex v. Rae*, 89.

CROWN ATTORNEY.

See MALICIOUS PROSECUTION.

CROWN PATENT.

Construction — Description of Land—Falsa Demonstratio—Reference to Recorded Plan.—A tract of land granted to the respondents by letters patent from the Crown was described therein as being in a certain township, containing a certain number of acres, and being composed of mining location S.V. 476, being land covered with the water of Peterson Lake, in front of certain other mining locations named, as shewn on a plan of survey by W., of record in the Department of Lands Forests and Mines. W.'s plan shewed that the whole of Peterson Lake was included in mining location S.V. 476:—*Held*, that the controlling words of the description were those referring to the mining location by its number as shewn on W.'s plan; and the other part of the description, if it was not an accurate description of the mining location as so shewn, must be rejected as *falsa demonstratio*.—Decision of the Mining Commissioner affirmed. *Re Finucane and Peterson Lake Mining Co. Limited*, 128.

DAMAGES.

See CARRIERS — CONSTITUTIONAL LAW—CONTRACT, 1—FRAUD AND MISREPRESENTATION—HIGHWAY, 1—HUSBAND AND WIFE—INNKEEPER, 1—MASTER AND SERVANT, 2—NUISANCE—PRINCIPAL AND AGENT—SHIP—STREET RAILWAYS.

DEATH.

See INSURANCE—MASTER AND

SERVANT, 1 — NEGLIGENCE —
TITLE TO LAND.

DEBENTURES.

See MUNICIPAL CORPORATIONS, 3.

DECLARATORY JUDGMENT.

See MARRIAGE.

DEED.

See CROWN PATENT—LAND
TITLES ACT—VENDOR AND PUR-
CHASER, 2.

DEPOSIT.

See INFANT, 1.

DEVISE.

See TITLE TO LAND.

DIRECTORS.

See BANKS AND BANKING—
COMPANY.

DISCONTINUANCE.

See COMPANY.

DISCRETION.

See PRACTICE—WILL.

DISQUALIFICATION.

See LANDLORD AND TENANT, 1.

DITCHES AND WATER- COURSES ACT.

*Award of Township Engineer—
Construction of Drain—Appointment
of Engineer—Regularity—
De Facto Engineer—Amendment
—Appeal from Award—Time—
Ruling of County Court Judge—
Error—Land of Infant Affected
by Award—Notice—"Owner"—
Father—"Guardian of an Infant"*

—*R.S.O. 1897, ch. 285, secs. 3, 8—
Sufficiency of Outlet.*]—In an action brought by three of the land-owners affected by an award made by the defendant F., as engineer of the township of M., under the Ditches and Water-courses Act, against the defendant R., who originated the proceedings under the Act, the defendant F. aforesaid, and the defendant C., the township engineer at the time when the action was brought, for a declaration that the award was illegal and made without jurisdiction and for an injunction and damages:—*Held*, (1) that the defendant F. was duly appointed engineer of the township, although the appointment of his predecessor had not been expressly revoked; apart from that, he was the *de facto* engineer of the township, and his actions were not open to question by reason of any possible defect in the mode of his appointment; and leave to the plaintiffs to amend by setting up that the defendant F. was not qualified as township engineer was refused.—(2) That the validity of the award was not affected by the ruling of a County Court Judge that an appeal to him from the award was not brought in time, even if the ruling was, as the plaintiffs contended, erroneous; and leave to set up this ground of invalidity by way of amendment was also refused.—(3) That notice to the father of an infant land-owner affected by the award was sufficient to satisfy sec. 8 of the Ditches and Water-courses Act, R.S.O. 1897, ch. 285,

which requires notice to be given to every "owner;" for, by the interpretation clause, "owner" includes "the guardian of an infant owner," and the father is guardian by nature, and the guardian intended by the statute, where there is no duly appointed guardian.—*Rimington v. Hartley* (1880), 14 Ch.D. 630, followed.—(4) That the ditch or drain constructed under the award had a sufficient outlet into Lake Simcoe.—*McGillivray v. Township of Lochiel* (1904), 8 O.L.R. 446, explained.—*Chapman v. McEwen* (1905), 6 O.W.R. 164, approved. *Healy v. Ross*, 184.

DOMICILE.

Change — Evidence — Onus — Marriage — Quebec Law — Holograph Will — Revocation — Intestacy.—The domicile of origin is not to be treated as abandoned upon slight evidence. The onus is upon those asking the Court to determine that a new domicile has been chosen, to satisfy the Court that there has been an actual intention on the part of the individual to abandon his domicile of origin. Acts, events, and declarations, subsequent to the time at which a domicile has been chosen, are admissible in evidence to shew what the intention was at that time.—And *held*, upon the evidence, that S., whose domicile of origin was in the Province of Quebec, was at the time of his decease domiciled in the Province of Ontario, and had become so domiciled at a time previous to his marriage on the 1st June, 1910; that upon his

marriage a holograph will made by him in Quebec, dated the 16th February, 1909, became revoked; and, it not being shewn that any other will was ever executed in accordance with the laws of Ontario, S. died intestate, and the plaintiff, as his widow, was entitled to letters of administration of his estate in Ontario.—Review of the authorities.—*Udny v. Udny* (1869), L.R. 1 Sc. App. 441, *In re Grove* (1880), 40 Ch.D. 216, and *In re Martin, Loustalan v. Loustalan*, [1900] P. 211, specially referred to. *Seifert v Seifert*, 433.

DRAINAGE.

See DITCHES AND WATER-COURSES ACT.

ELECTION.

See FRAUD AND MISREPRESENTATION.

ELECTIONS.

See PARLIAMENTARY ELECTIONS.

ELECTRIC SHOCK.

See MASTER AND SERVANT, 3— NEGLIGENCE, 2.

ENTICEMENT.

See HUSBAND AND WIFE.

EQUITABLE RELIEF.

See VENDOR AND PURCHASER, 1.

ESTOPPEL.

See FRAUD AND MISREPRESENTATION — LANDLORD AND TENANT, 1—MUNICIPAL CORPORATIONS, 3.

EVICTION.

See LANDLORD AND TENANT, 2.

EVIDENCE.

See CRIMINAL LAW, 2—DOMICILE—FRAUD AND MISREPRESENTATION—INNKEEPER, 1—INSURANCE—JUDGMENT, 2—LANDLORD AND TENANT, 1—LIMITATION OF ACTIONS, 1—MASTER AND SERVANT, 2, 3, 5—MINES AND MINERALS—PARTNERSHIP—PRINCIPAL AND AGENT—RAILWAY, 6—SOLICITOR—TITLE TO LAND—TRUSTS AND TRUSTEES—WATER—WILL.

EXECUTION.

See JUDGMENT, 1—PRACTICE.

EXPLOSION OF GAS.

See MASTER AND SERVANT, 5.

EXPROPRIATION.

See RAILWAY, 3, 4.

FALSA DEMONSTRATIO.

See CROWN PATENT.

FALSE REPRESENTATIONS.

See FRAUD AND MISREPRESENTATION.

FATAL ACCIDENTS ACT.

See MASTER AND SERVANT, 1—NEGLIGENCE, 2.

FIRE.

See RAILWAY, 1.

FOREIGN LAW.

See DOMICILE—SOLICITOR.

FORFEITURE.

See JUDGMENT, 1—LANDLORD AND TENANT, 2.

FRAUD AND MISREPRESENTATION.

Purchase of Patent for Invention — Contract — Rescission — Damages — Conduct — Election to Affirm or Disaffirm—Evidence — Estoppel — Finding of Trial Judge—Appeal.]—The plaintiff alleged and proved fraud and misrepresentation of the defendants whereby he was induced to enter into an agreement for the purchase of a patent for an invention, and was *held*, entitled to have the agreement set aside and to damages made up of the money he had paid and a further sum for loss of time, expense, etc.; and it was also *held* (RIDDELL, J., dissenting), that the plaintiff had not by his conduct elected to affirm the contract, although he withheld from the defendants notice of his intention to disaffirm it, and acted for some time as if he did intend to affirm.—In general a contract induced by misrepresentation is valid until disaffirmed; whether or not there has been an election in fact depends upon the view taken of the evidence; and in this case, having regard to the facts as found by the trial Judge and the credit which he gave to the plaintiff's evidence, it could not be said that the plaintiff had elected to affirm. An estoppel could arise only on proof that the defendants had been prejudicially affected by a belief that the plaintiff was treating the contract as binding.—*Morrison v. Universal Marine Insurance Co.* (1872–3), L.R. 8 Ex. 40, 197, followed.—*Campbell v. Fleming* (1834), 1 A. & E. 40, distinguished.—*Per*

RIDDELL, J.:—The plaintiff, by reason of his conduct, was not entitled to repudiate the contract; but that would not prevent his succeeding in an action for deceit.—Judgment of LENNOX, J., affirmed. *Carrique v. Catts and Hill*, 548.

See INFANT, 1.

GAS COMPANY.

See MUNICIPAL CORPORATIONS, 2.

GIFT.

Intended Marriage—Breach of Condition—Termination of Engagement—Recovery of Gifts Made in Contemplation of Marriage.—The defendant promised to marry the plaintiff upon condition of his absolutely refraining thereafter from taking any intoxicating liquor:—*Held*, upon the evidence, that the plaintiff had broken his promise, and that the engagement came to an end by reason of the breach of the condition on which it was entered into.—*Held*, also, that the plaintiff was not entitled to recover any personal presents which, during the engagement, he made to the defendant in prospect of marriage; *aliter*, as to articles purchased with the plaintiff's money with a view to furnishing a house upon marriage, and articles and money lent to the defendant.—*Robinson v. Cumming* (1742), 2 Atk. 409, and *Ryan v. Whelan* (1901), 21 C.L.T. Occ. N. 406, considered.—Judgment of the County Court of the County of Waterloo varied. *Seiler v. Funk*, 99.

GUARDIAN.

See DITCHES AND WATER-COURSES ACT—INFANT, 2.

HIGHWAY.

1. *Nonrepair—Injury to Traveller—Road Assumed by County Corporation—Highway Improvement Act, 7 Edw. VII. ch. 16 (O.)—Duty to Repair and Maintain—Negligence—Absence of Guard-rail at Dangerous Place—Liability of County Corporation—Limits of Road Assumed—By-law—Construction—"Concession"—Damages—Costs.*—In an action brought against the municipal corporations of a county, two townships, and a city, to recover damages for personal injury to the plaintiff and injury to his motor car, by reason, as he alleged, of the negligence of the defendants, or some or one of them, in not placing and maintaining a guard-rail or other protection at a place upon a highway where a ditch had been made and a culvert built, so that when the plaintiff backed his car upon the highway it ran into the ditch, and the injuries complained of followed, it was *held*, upon the evidence, that the defendant county municipality owed a duty to the plaintiff, and to all other persons lawfully travelling upon the road in question, to provide some efficient guard against the accident which happened, and all like accidents arising from the danger which the unguarded ditch created; the neglect of that duty was the proximate cause of the accident and of all the injury which was the result of it; and that, if there were any negli-

gence on the part of the plaintiff, it was not a proximate cause of the accident, nor was it contributory negligence disentitling the plaintiff to recover.—The statute-imposed duty of a municipality in regard to the care of highways is to keep them in repair. The Highway Improvement Act, 7 Edw. VII. ch. 16 (O.), under the provisions of which the defendant county municipality assumed the road, adds the word “maintain,” but unnecessarily, for to keep in repair includes maintenance; and keeping in repair includes renewal. A municipality must, having regard to its means, keep the roads under its control in a state reasonably sufficient for the requirements of the traffic over them.—In one part of the county by-law assuming the road, it was described as “across the 3rd, 4th, 5th, and 6th concessions;” and in another as “facing” the same concessions:—*Held*, that the interpretation put upon the by-law by all the municipalities should be adopted, that is, that it covered the whole of the road in question to the middle line of the intersecting road, and so included the place in question; but, if that were not so, the defendant county municipality were liable as wrongdoers for constructing the culvert and making the ditch and road at the place aforesaid.—*Seemle*, that the “lines” or roads between concessions, being frequently spoken of as “concessions,” may have been referred to in the by-law; and, besides, the concession proper may extend to the middle

line of the road upon which it fronts. See secs. 17 and 33 of the Surveys Act, R.S.O. 1914, ch. 166.—And *held*, that the plaintiff was entitled to recover from the defendant county municipality damages for the injuries he sustained in the accident, with the costs of the action; and that the other defendants were entitled to have the action dismissed as to them, but without costs.—The plaintiff’s damages were assessed at \$1,000. *Ackers-viller v. County of Perth*, 423.

2. *Obstruction — Trolley Pole Erected by Street Railway Company in Public Street between Tracks—Injury to Travellers by Vehicle Striking Pole at Night—Absence of Light or other Safe-guard — Negligence — Nuisance—Contributory Negligence—Findings of Jury—Statutory Authority—36 Vict. ch. 100 (O.)—Municipal By-law—Liability of Company.*—The defendants, a street railway company, incorporated under 36 Vict. ch. 100 (O.), were authorised by sec. 7 to construct their railway upon and along such streets in the city of H. as the council of the city by agreement might authorise, and subject to by-laws made in pursuance thereof, and to construct and maintain all necessary works, appliances, and conveniences connected therewith. By sec. 15, the city corporation and the defendants were authorised to make agreements relating to the construction and location of the railway, and the particular streets along which it should be laid, and

the non-obstructing or impeding of the ordinary traffic. Section 16 gave the city corporation authority to pass by-laws for the purpose of carrying such agreement into effect and to regulate the traffic and conduct of persons travelling upon the streets through which the railway should pass. The defendants' railway was constructed and operated under various agreements and by-laws until 1892, when a new agreement was made and a by-law passed by the city council authorising the operation of the railway by electricity and the erection of all necessary poles and wires for the completion of the railway upon the trolley system. The streets upon which the railway was to be operated were specified, and the public were given the right to travel upon the tracks, provided they did not impede or interfere with the defendants' cars. It was also provided that the poles should be placed on the sides of the streets, except in a part of K. street, where they should be placed on the devil's strip between the two tracks; and all the poles were to be placed in such manner as to obstruct as little as possible the use of the streets for other purposes. The poles and wires were erected accordingly, and the railway operated. Afterwards, that part of K. street referred to was narrowed, but the poles were left between the tracks. In 1913, the plaintiffs, who were driving in a motor car, at night, along K. street, ran into one of the poles upon the devil's strip, which was unguarded and unlighted, and were injured. In an action brought to recover damages for the plaintiffs' injuries, the jury found the defendants guilty of negligence, in that "the trolley poles should have been placed in a uniform position along the entire thoroughfare;" that the plaintiffs could not, by the exercise of reasonable care, have avoided the accident; and assessed damages in favour of two of the plaintiffs. Upon appeal by the defendants from the judgment entered upon these findings:—*Held*, that to leave a pole erected in such a place unlighted at night was to create a dangerous nuisance; and the jury, upon the evidence, might well consider the pole an obstruction to the highway, and so leaving it an act of negligence.—(2) That the power of a Provincial Legislature and of a municipal corporation to interfere with a public highway is a limited one; it does not go the length of authorising something to be done which will endanger the safety of the travelling public and create a common nuisance. It was incumbent on the defendants to shew some express statutory warrant for the maintenance of the pole in the position and condition in which it was; and, even if such warrant could be considered to be given or properly inferred from the statute and by-law, it could not be deemed to extend further than this, that a pole could lawfully be placed in such a position when all needed precautions were taken to safeguard the public.—Review

of the authorities.—*Atkinson v. City of Chatham* (1899), 26 A.R. 521, and in the Supreme Court of Canada, *sub nom. Bell Telephone Co. v. City of Chatham* (1900), 31 S.C.R. 61, specially referred to.—(3) That the findings of the jury could not, upon the evidence, be disturbed, and the judgment should be affirmed (HODGINS, J.A., dissenting).—*Per* HODGINS, J.A.:—The authority to construct the railway along the streets and to maintain all necessary works, appliances, and conveniences connected therewith, and the reservation to the municipality of the right to deal with the non-obstruction and impeding of ordinary traffic, and to pass by-laws dealing with the regulation of the traffic along the streets occupied by the railway, taken together, gave legislative sanction to the doing of something that might obstruct and impede, and delegated to the city corporation authority to deal with that feature. It is not consistent with our theory of municipal government to hold that the *bonâ fide* exercise of those powers could be controlled or interfered with by the Courts. If the placing of the pole in the position indicated was proper, yet authority to place it there might not absolve the defendants from the duty of using all proper diligence to prevent injury therefrom; and it might be that the maintenance of the pole in its place, after the street was narrowed, was negligent and improper without further precautions being taken. The judgment should be set

aside, and there should be a new trial, so as to allow the plaintiffs to urge any ground open to them, having regard to the maintenance of the pole and the change in the condition of the street. *Weir v. Hamilton Street R.W. Co.*, 578.

See MUNICIPAL CORPORATIONS, 1, 2—WATER.

HIGHWAY CROSSING.

See RAILWAY, 6.

HOLOGRAPH WILL.

See DOMICILE.

HUSBAND AND WIFE.

Enticement of Wife—Alienation of Affections — Separate Claims—Overlapping—Findings of Jury—Damages—Right of Action—Absence of Adultery—Wife Living with Husband.—The defendant was sued for (1) enticing away and (2) alienating the affections of the plaintiff's wife, and the jury assessed damages upon each claim separately:—*Held*, that the action was maintainable notwithstanding that his wife was still living with the plaintiff and that the jury had not found that adultery had been committed.—*But held*, that the plaintiff had suffered no damage beyond the loss of his wife's affections, love, services, and society, and should be confined to the damages assessed by the jury upon the claim for alienation.—*Winsmore v. Greenbank* (1745), Willes 577, followed.—Judgment of MIDDLETON, J., 29 O.L.R. 562,

varied. *Bannister v. Thompson*, 34.

See PRACTICE.

ICE.

See WATER.

IMMINENT DANGER.

See RAILWAY, 6.

IMPROVEMENTS.

See LANDLORD AND TENANT,
2—TITLE TO LAND.

INDECENT ASSAULT.

See CRIMINAL LAW, 2.

INDEPENDENT CONTRACTOR.

See MASTER AND SERVANT, 1.

INFANT.

1. *Agreement for Purchase of Land—Payment of Sum as Deposit—Right to Recover—Absence of Fraud—Consideration.*]—Although an infant is not compellable to complete a contract, yet when he has paid money under it, he cannot recover it back unless he can shew that fraud has been practised upon him.—*Wilson v. Kears* (1800), Peake Add. Cas. 196, and *Holmes v. Blogg* (1817), 8 Taunt. 35, 2 J.B. Moore 552, approved and applied to a case where the plaintiff, an infant, agreed to purchase from the defendant a house and lot and paid a deposit at the time the agreement was signed, and where the evidence negatived any misrepresentation on the part of the defendant, and shewed that the plaintiff took possession

of and controlled the property. *Short v. Field*, 395.

2. *Guardian of Estate—Trust Company—Encroachment upon Capital for Maintenance and Education—Disallowance—Benefit of Infant—Costs of Action Brought against Company—Loss of Personal Property—Evidence—Guardian of Person—Officer of Trust Company—Improper Appointment—Compensation for Services—Loan and Trust Corporations Act, R.S.O. 1914, ch. 184, sec. 18 (e).*]—The Court does not sanction the use of the corpus of an infant's estate for maintenance unless satisfied that such use will be more beneficial to the infant than preserving his property intact until he comes of age: there should be no encroachment on the principal except for unavoidable reasons falling little short of necessity.—*Goodfellow v. Rannie* (1873), 20 Gr. 425, and *Crane v. Craig* (1886), 11 P.R. 236, approved.—An orphan boy became entitled at the age of 19 to his mother's estate, of the value of about \$9,000. A trust company were appointed administrators of the mother's estate and guardians of the boy's estate, one of their officers being appointed guardian of his person. During the two years of his minority the company expended on his behalf for board, education, medical fees, travelling expenses, and paid to him for clothing, pocket-money, and other purposes, sums amounting in the aggregate to \$1,100 more than the income of his estate:—

Held, that the sums paid out of capital, with the exception of \$100, should not be allowed to the company upon the passing of their accounts.—*Held*, also, that the costs of an action brought by the infant and others against the company, which resulted in relieving the corpus of the estate from payment of a large sum of money improperly disbursed by the company, should be paid by the company.—*Held*, also, upon the evidence, that the company were not chargeable with the loss of certain personal and household effects said to have formed part of the mother's estate.—*Held*, also, that it was not competent for the company to be appointed guardians of the person of the infant: Loan and Trust Corporations Act, R.S.O. 1914, ch. 184, sec. 18 (e); the appointment of an officer of the company as guardian was an evasion of the spirit of that Act; and the guardian so appointed was not entitled to any compensation out of the estate for his services.—Order of the Judge of the Surrogate Court of the County of York, varied. *Re Rundle*, 312.

See DITCHES AND WATER-COURSES ACT.

INJUNCTION.

Interim Injunction Restraining Sale under Chattel Mortgage—Qui tam Action—Simple Contract Creditor—Preference—Account—Dissolution of Injunction.]—The plaintiff moved to continue, till the trial, an interim injunc-

tion restraining the defendants from seizing and selling under a chattel mortgage the goods of a firm alleged to be indebted to the plaintiff. The plaintiff sued on behalf of himself and all other creditors of the firm; he did not allege insolvency; but grounded his action upon the allegation that the proposed seizure and sale would create an unjust preference:—*Held*, that a simple contract creditor, even suing in a class action, cannot invoke the aid of the Court to restrain a chattel mortgagee from realising upon his security, unless alleging more than this plaintiff alleged, without satisfying the Court that the circumstances indicated some infraction of the statutes relating to preferences; and the Court will not, upon such an application, take the account, nor restrain realisation by a solvent creditor upon his mortgage, except upon at least *prima facie* proof of invalidity.—The motion was, therefore, refused. *Bassi v. Sullivan*, 14.

See CONSTITUTIONAL LAW—COVENANT—NUISANCE—STREET RAILWAYS.

INNKEEPER.

1. *Liability for Luggage of Boarder Lost or Stolen—Status of Innkeeper—Keeper of Boarding-house—Duty to Take Reasonable Care—Undertaking—Bailment—Onus—Evidence—Findings of Jury—Judge's Charge—Credibility of Witnesses—Damages—Finding of Fact by Appellate Court—Judicature Act, R.S.O.*

1914, *ch. 56, sec. 27*—*Innkeepers' Act, R.S.O. 1914, ch. 173, secs. 4, 6*—*Limitation of Liability—Pleading—Exception—Deposit for Safe Custody*.]—The plaintiff, who had engaged a room at the defendants' hotel for three months, sent her trunk there pursuant to an arrangement with the hotel clerk. When she arrived at the hotel on the following day, the trunk could not be found, and had been apparently lost or stolen. It was never found; and, in an action for the value of the trunk and contents, the jury found that the defendants had received the trunk; they assessed the damages at \$800, for which sum judgment was entered in her favour by the trial Judge:—*Held*, that, while the defendants' status and liability in regard to the plaintiff was not that of an innkeeper or hotelkeeper, but rather that of a boarding-house keeper, they were bound to take reasonable care of her trunk.—An innkeeper or hotelkeeper may also be a boarding-house keeper. Distinction between the liability in the one case and that in the other pointed out.—Review of the authorities.—*Dansey v. Richardson* (1854), 3 E. & B. 144, *Scarborough v. Cosgrove*, [1905] 2 K.B. 805, *Holder v. Soulby* (1860), 29 L.J.N.S.C.P. 246, 8 C.B.N.S. 254, and *Lamond v. Richard*, [1897] 1 Q.B. 541, specially referred to.—*Per* MULLOCK, C.J.Ex., and CLUTE, J.:—There was an express agreement by the defendants, through their clerk and servant, to take charge of the

plaintiff's trunk and place it in her room. The reasonable duty so undertaken was entirely disregarded; the trunk was left in the passage-way unprotected, and was taken away or stolen and lost through the neglect and default of the defendants. The jury were not charged on the question of negligence, but were told that if they found that the trunk came to the premises of the defendants, the defendants were liable. This charge could not be sustained; but it was not necessary to send the case back for a new trial: the principal facts were not contradicted; and the Court had the right, under sec. 27 of the Judicature Act, R.S.O. 1914, *ch. 56, sec. 27*, to find, and should find as a fact, that the defendants did not take reasonable care of the trunk, and that this neglect amounted to negligence, and rendered them liable to the plaintiff for the loss of her trunk and contents.—*Per* HODGINS, J.A., and RIDDELL, J.:—The facts of the case made the defendants bailees of the trunk and its contents, and their duty was to take such due and proper care of them as a prudent owner might reasonably be expected to take of his own goods. There was no evidence of any care; and the trial Judge properly charged the jury that the defendants were liable if they received the trunk; it was not necessary for him to tell the jury that the defendants had not proved that the default was not due to their negligence. If the charge was defective, the Court should proceed

under sec. 27 of the Judicature Act and find that the defendants, not having met the onus cast on them by law, were liable for the loss of the goods.—It is always the right and sometimes the duty of a Judge to express his opinion of the credibility of a witness for the assistance of the jury; and, so long as he does not usurp the functions of the jury, but explains to them that they are the judges of fact, he is not trespassing.—*Semble, per RIDDELL, J.*, that to have the benefit of the Innkeepers' Act, R.S.O. 1914, ch. 173, it is not necessary to plead it.—And *held, per Curiam*, that the defendants were not entitled to the benefit of sec. 4 of the Act, limiting the damages to \$40, because the defendants had not (the onus being upon them) shewn compliance with sec. 6, requiring a copy of sec. 4 to be kept posted in certain places in an inn or hotel; and also because the goods had been deposited expressly for safe custody with the defendants, and so came within the exception in sub-sec. 2 of sec. 4. *Macdonell v. Woods*, 283.

2. *Lien—Property of Stranger Brought to Inn by Guest—Innkeepers' Act, 1 Geo. V. ch. 49—Supplement to Common Law.*—The provisions of the Innkeepers' Act, 1 Geo. V. ch. 49 (R.S.O. 1914, ch. 173), are supplementary to the common law; the statute is not a codification of the whole law as to the lien of innkeepers; and the common law right of the innkeeper to a lien on the proper-

ty of a stranger brought to the inn by a guest has not been taken away by the statute.—*Huffman v. Walterhouse* (1890), 19 O.R. 186, and *Newcombe v. Anderson* (1885), 11 O.R. 665, 682, approved.—The main purposes of the statute defined.—Judgment of the Senior Judge of the County Court of the County of York affirmed. *United Typewriter Co. v. King Edward Hotel Co.*, 126.

INSPECTION.

See MASTER AND SERVANT, 2.

INSURANCE.

Life Insurance—Presumption of Death of Assured—Seven Years' Absence Unheard of—Limitation of Time for Bringing Action—Terms of Policy—Insurance Act, R.S.O. 1914, ch. 183, sec. 165—Application and Meaning of—Computation of Time—Hearsay Evidence—Admissibility.—In an action, begun on the 16th July, 1913, upon a paid-up policy of insurance on the life of D., who had disappeared and had not been seen or heard of by any of his relatives since 1903, the defendants contended that, if on the facts shewn D. was to be presumed to be dead, that presumption arose at the expiry of seven years from his disappearance, and the action was brought too late, as it was begun more than one year and six months from the end of the seven years: sec. 165 of the Insurance Act, R.S.O. 1914, ch. 183. At the trial a witness deposed that he knew D. intimately, and in 1905

was told by the conductor of a train that within probably six months or a year he had met D.:—*Held*, by MIDDLETON, J., at the trial, that the provisions of sec. 165 afforded no answer to the action: the policy was a contract to pay, and it contained no conditions or limitations as to the time to sue; sec. 165 gives a time to sue, notwithstanding any agreement or stipulation limiting the time to be found in the contract; it does not itself purport to limit the time within which an action may be brought; but, in case of the assured, it gives the time there stipulated, notwithstanding the provisions of the contract. — The judgment of MIDDLETON, J., in favour of the plaintiff, for the recovery of the amount of the insurance, was affirmed by a Divisional Court of the Appellate Division.—*Held*, by MULLOCK, C.J. Ex., and SUTHERLAND, J., approving and following *Jackson ex dem. Miner v. Bonham* (1818), 15 Johns. (N.Y.) 226, and *Scott v. Ratcliffe* (1831), 5 Peters 80, 85, that the evidence of the witness above referred to was admissible; that it established a starting-point from which to compute the period of seven years within which D. had not been heard from; that on the expiry of that period the plaintiff became entitled to the insurance money; that it was for the defendants to shew that the period expired more than one year and six months before the 16th July, 1913, according to sub-sec. 2 of sec. 165; and that they had failed to do.—*Per* CLUTE, J., that

the seven years which raise the presumption of death are the seven years preceding the commencement of the action; sec. 165 was meant to apply to cases where restrictions as to time in the contract of insurance might be unreasonable, and in furtherance of the assured's right to recover; and here, where there was an absolute promise to pay, and it was expressly provided that "payment of the sum insured by this policy shall not be disputed," the statute had no application.—*Per* RIDDELL, J., that in an action for a declaration that a person may be presumed to be dead, the Court in presuming the death does so on the ground that the person has not been heard of within seven years before the date of the writ of summons by which that action is commenced; the test is, not that he has not been heard of for seven years after some date in the past, but for seven years before the teste of the writ; the sole presumption in this case was, that D. was dead at the date of the writ; if it was of importance to the defendants to establish the date of his death, they were called on to give evidence, which they failed to do; and, if sub-sec. 2 of sec. 165 was applicable to this action, in which the real object to be attained was the payment of the policy, and the declaration of presumption was asked merely as ancillary, the term of seven years began just seven years before the teste of the writ, and the action was in time, being brought exactly at

the expiration of the seven years. *Duffield v. Mutual Life Insurance Co. of New York*, 299.

INTERVENTION.

See MARRIAGE.

JOINDER OF PARTIES.

See COMPANY—CONTRACT, 1.

JUDGMENT.

1. *Execution — Contract — Construction — Merger — Forfeiture — Sale of Land — Judgment Unenforceable except as to Costs.*—Judgment in this action was recovered by the plaintiffs in the circumstances set out in the reports in 16 O.L.R. 372 and 41 S.C.R. 607 (*sub nom. Clergue v. H. H. Vivian & Co.*). After the judgment of the Supreme Court of Canada, the plaintiffs sold the mining property in question for \$75,000, after having forfeited it under a power in that behalf contained in an agreement of the 10th March, 1905, to which the plaintiffs, the defendant, and a mining company were parties, the terms of which are set out in the reports referred to:—*Held*, that the forfeiture under the agreement, and the sale pursuant thereto, worked such a destruction of the plaintiffs' rights against the defendant as disabled them from further pursuing him in respect of the debt.—*Construction of the agreement.*—Order of KELLY, J., declaring that the plaintiffs were not entitled to enforce their judgment and execution against the defendant, except as to costs, affirmed.—*Cam-*

eron v. Bradbury (1862), 9 Gr. 67, *Fraser v. Ryan* (1897), 24 A.R. 441, *Gibbons v. Cozens* (1898), 29 O.R. 356, *McPherson v. United States Fidelity and Guaranty Co.* (1914), 6 O.W.N. 677, applied. *H. H. Vivian Co. Limited v. Clergue*, 200.

2. *Summary Judgment — Motion for—Practice—Rules 56, 57 — Affidavit of Defendant Filed with Appearance — Cross-examination—Affidavit of Plaintiff in Support of Motion.*—Under the new practice introduced by Rules 56 and 57, where the writ of summons is specially endorsed, the plaintiff may move for summary judgment without cross-examining the defendant upon the affidavit filed with his appearance; and, if the affidavit does not disclose a good defence nor set out facts and circumstances sufficient to entitle the defendant to defend, judgment will be granted to the plaintiff. An affidavit filed by the plaintiff in support of his claim, though it may not be necessary, is unobjectionable. Rule 57 does not alter the practice laid down in *Jacobs v. Booth's Distillery Co.* (1901), 85 L.T.R. 262—upon a motion under that Rule the Court does not attempt to determine facts in issue upon controversial affidavits.—*Judgment of DENTON, Jun. Co. C. J., York, affirmed. Langdon-Davies Motors Canada Limited v. Gasolelectric Motors Limited*, 84.

See COMPANY—CONTRACT, 1—LAND TITLES ACT—PRACTICE—VENDOR AND PURCHASER, 3.

JURISDICTION.

See MARRIAGE — ONTARIO
RAILWAY AND MUNICIPAL BOARD
—RAILWAY, 3—SHIP—TITLE TO
LAND.

JURY.

See HIGHWAY, 2—HUSBAND
AND WIFE—INNKEEPER, 1—MALI-
CIOUS PROSECUTION—MASTER
AND SERVANT, 1, 4—MINES AND
MINERALS — NEGLIGENCE, 1 —
RAILWAY, 6—WATER.

LAND TITLES ACT.

Mortgage in Form Prescribed by Short Forms Act—Inability to Register—Deed of Assignment for Benefit of Creditors—Registration of — Priorities — R.S.O. 1914, ch. 126, secs. 30 (2), 45, 115—Form of Judgment—Rectification of Records—Declaration of Trust —Costs.]—In November, 1910, the registered owner of land conveyed it by way of mortgage to the plaintiffs as security for a debt—the mortgage-deed being in the form provided by the Short Forms of Mortgages Act. The land having been brought under the Land Titles Act, the mortgage could not be registered, and no registration of a charge was effected; in 1912, the plaintiffs procured the mortgagor to execute an instrument in the proper form under the Act. In the meantime the mortgagor had made an assignment to the defendant for the benefit of creditors, and the defendant had registered the assignment against the land mortgaged to the plaintiffs. In this action, the plaintiffs asked for a declaration that their

mortgage was entitled to priority over the assignment; for a direction that the assignment be removed from the register or otherwise postponed to the mortgage; and for costs. At the trial judgment was given in favour of the plaintiffs: (1) declaring that their mortgage was entitled to priority over the assignment, and directing that it be so recorded, and the register and records in the Land Titles office be rectified accordingly; (2) requiring the plaintiffs to value their security in connection with their claim against the estate of the mortgagor in the hands of the defendant; (3) directing that the plaintiffs be entitled to add the costs of the action to their claim against the estate; and (4) directing that the defendant's costs of the action should be paid out of the estate:—*Held*, upon appeal, affirming the judgment, that the plaintiffs were entitled to priority, the defendant not being a transferee for value: sec. 45 of the Land Titles Act, R.S.O. 1914, ch. 126.—*Per* MULOCK, C.J.Ex., and CLUTE, J., that sec. 115 of the Act was applicable; and that the judgment should be varied by directing that, instead of recording the mortgage-deed in the books of the Land Titles office as a link in the chain of title, it should be deposited with the proper Master of Titles, and he should enter the plaintiffs on the register as owners of a charge, with such particulars to be taken from the mortgage-deed as are required by sub-sec. 2 of sec. 30 of the Act.—*Per* MACLAREN, J.A.,

and RIDDELL, J., that, in view of the many difficulties attending amendment of the records of a Master of Titles, it was not wise to order any change under sec. 115; the judgment should be varied by substituting for the direction to amend the records a declaration that the defendant was a trustee for the plaintiffs to the extent of their mortgage, in priority to the trusts of his assignment. — The members of the Court not being agreed as to the variation to be made, the appeal was dismissed with costs. *John Macdonald & Co. Limited v. Tew*, 262.

LANDLORD AND TENANT.

1. *Buildings of Tenant—Payment for, by Landlord—Covenants in Leases—Submission to three Persons to Determine "Amount Proper to be Paid"—Arbitration or Valuation—Conduct of Valuator—Bias—Disqualification—Evidence—Admission of ex Parte Statements—Special Circumstances—Agreement of Parties—Method of Valuation—Entire Building—Disjointed Parts—Estoppel—Misapprehension or Mistake of Valuers—Effect of, in Action upon Covenants.*—In an action by lessee against lessor to recover the amount found by a board of valuers, appointed under provisions of the leases, to be the value of the buildings erected by the lessee upon the demised premises:—*Held*, following *Re Irwin and Campbell* (1913), 4 O.W.N. 1562, 5 O.W.N. 229, that the proceedings were by way of valuation, not arbitration.—(2)

That the finding of the trial Judge that one of the valuers was not (as the defendant contended he was) disqualified by reason of bias, should, on the evidence, be affirmed.—(3) That, upon the evidence, the arrangement between the parties was that the valuers, who had no special skill or knowledge, and had no authority to take evidence under oath, were to seek information as best they could for the purpose of their valuation; and their finding was not invalidated by reason of their accepting *ex parte* statements and making individual inquiries. The statement in *Hudson on Building Contracts*, 3rd ed., p. 73, that there is no restriction upon what a valuator may do for the purpose of making his valuation, must be taken with some limitation; the rule in cases of arbitration which excludes such statements may be applicable in the ordinary case of valuation; but this case must be decided upon its peculiar and unusual circumstances.—(4) That the party seeking to take property cannot rely on a depreciation caused by his own act or on the assumption that he can take an attitude which will injure the value to the owner; and in this case the defendant could not, in dealing with the 14 feet upon which half of one of the buildings stood, exclude from consideration the fact that she was acquiring the other half, and require the valuers to arrive at a value upon the assumption that she was receiving only part of it. The words of the leases, "the

amount proper to be paid," were large enough to cover a valuation of the building as an entire one, and not as disjointed portions of a building.—*In re Lucas and Chesterfield Gas and Water Board*, [1909] 1 K.B. 16, and *Re Gibson and City of Toronto* (1913), 28 O.L.R. 20, applied and followed.—(5) *Quære*, whether a misapprehension of the facts or a mistake in law by the valuers could be reviewed in an action upon the covenants in the leases.—Judgment of LENNOX, J., affirmed. *Campbell v. Irwin*, 48.

2. *Lease — Surrender — Acceptance by Reletting—Eviction—Forfeiture of Rent Accrued—Apportionment of Rent—Apportionment Act, R.S.O. 1914, ch. 156, sec. 4—Payment for Occupation for Broken Period—Agreement—Deduction for Improvements—Costs.*—The plaintiff on the 25th October, 1906, leased a farm to the defendant for ten years. The defendant did not get possession under the lease until the 1st March, 1907, and remained in possession only until about October, 1908, and paid only half a year's rent. When the defendant gave up possession, he notified the plaintiff, and the plaintiff relet the farm in April, 1909, without notifying the defendant that the reletting was on his account:—*Held*, that this amounted to an acceptance of the surrender and an eviction of the defendant.—*Walls v. Atcheson* (1826), 3 Bing. 462, followed.—While under the common law rent is not due for any intermediate broken period,

and the rent accruing is forfeited by re-entry before the gale-day, that result has been changed by the clause in the Apportionment Act (now R.S.O. 1914, ch. 156, sec. 4), providing that all rent is to be regarded as accruing due from day to day.—*Hartcup & Co. v. Bell* (1883), Cab. & El. 19, followed.—And the plaintiff was *held* entitled to recover a sum of money, upon the basis of the rent reserved, for the period of the defendant's actual occupation and for the period between his going out and the incoming of the new tenant, less the gale of rent paid and less an allowance for money expended and work done by the defendant upon the demised premises, pursuant to an agreement between the parties; the plaintiff to have costs on the County Court scale, with the usual set-off to the defendant. *Crozier v. Trevarton*, 79.

LEASE.

See LANDLORD AND TENANT.

LICENSE.

See ALIEN ENEMY.

LIEN.

See INNKEEPER, 2—MECHANICS' LIENS—PROMISSORY NOTE.

LIFE INSURANCE.

See INSURANCE.

LIMITATION OF ACTIONS.

1. *Possession of Land—Limitations Act—Purchase by Owner at Tax Sale—Tax Deed—New Commencement of Title, Free from*

*Previous Possession—Subsequent Possession—Evidence—Starting-point for Possession after Sale—Land Acquired by Municipality for Public Purpose—Assessment Act, R.S.O. 1914, ch. 195, secs. 94, 171.]—P. bought the land in question, now in the city of W., at a tax sale on the 21st December, 1900, and received a statutory deed dated the 15th January, 1902. P. had previously owned the land, but, there being a defect in the registered title, he intentionally allowed the taxes to become in arrear, and bought at the sale had for the purpose of realising the arrears. The plaintiffs claimed to have acquired a statutory title by uninterrupted possession adverse to P. for a period long before the tax sale, until disturbed in 1914 by the defendants, the city corporation, who had bought from P., for a special public purpose, in 1910:—*Held*, that P. had a right to purchase as he did; there is no objection to the prior owner of the land buying it at a tax sale resulting from his own failure to pay the taxes.—*Stewart v. Taggart* (1872), 22 U.C.C.P. 284, approved.—Review of American authorities.—(2) That any possession which the plaintiffs had before the tax deed could not run in their favour: the deed created a new commencement of title, freed from any such possession: sec. 149 of the Assessment Act, R.S.O. 1897, ch. 224 (now sec. 94 of R.S.O. 1914, ch. 195).—*Tomlinson v. Hill* (1855), 5 Gr. 231, approved and applied.—(3) That*

upon the evidence, the plaintiffs had not shewn sufficient possession since the tax deed to support their claim under the Limitations Act.—The point that no estate could be acquired in the land by virtue of the statute, because it was bought by the defendants under a special statute for a special public purpose, was not considered.—*Per RIDDELL, J.*:—The time began to run in favour of the plaintiffs, not from the day of the “knocking down” to P., but from the day on which he became entitled to his deed under sec. 171 of the Assessment Act, R.S.O. 1914, ch. 195, *i.e.*, in December, 1901.—Judgment of LENNOX, J., reversed. *Soper v. City of Windsor*, 352.

2. *Promissory Note—Acknowledgment in Writing.]—To an action begun on the 5th November, 1912, to recover the amount of a promissory note made by the defendant and his brother, dated the 1st November, 1903, payable one year after date, the defendant pleaded the Limitations Act; and it was held, that a letter written by the defendant to the plaintiff, dated the 8th November, 1906, in which the defendant said: “I thought that note matter was settled long ago. I will write my brother John for details, and on receipt of his reply you will hear from me again”—assuming that the letter referred to the note—was not a written acknowledgment of the debt from which a promise to pay might be inferred.—Judgment of COATSWORTH, JUN. CO. C.J., York,*

reversed. *Wood v. Tromanhauser*, 370.

See INSURANCE—PRACTICE — RAILWAY, 1.

LOAN AND TRUST CORPORATIONS ACT.

See INFANT, 2.

LOST LUGGAGE.

See INNKEEPER, 1.

MALICIOUS PROSECUTION.

Reasonable and Probable Cause—*Advice of Counsel*—*Approval of Crown Attorney*—*Malice*—*Findings of Jury*—*Dismissal of Action*—*Costs.*—In an action for malicious prosecution, the existence of malice does not warrant a finding of the lack of reasonable and probable cause; but where malice exists a careful scrutiny of the circumstances is rendered necessary, as the lack of good faith removes any presumption that might otherwise exist in favour of the defendant.—Where the facts are placed fully and fairly before experienced counsel, and in particular where the facts are submitted to the Crown Attorney, and a prosecution is advised, this constitutes reasonable and probable cause.—The existence of reasonable and probable cause is to be determined having regard to the facts as they appeared to the defendant at the time of laying the information.—The defendant laid an information against the plaintiff for forgery in writing a certain letter and for perjury in denying the writing of it in testifying in a

cause pending in Court. The prosecution terminated favourably to the plaintiff, and he brought this action for malicious prosecution. Before the information was laid, two experts had given an unqualified opinion that the hand which had written a certain other document, admitted to be in the handwriting of the plaintiff, was the hand which wrote the letter. Some other circumstances in connection with the letter pointed to the plaintiff as one who might have written it. The prosecution was advised by an experienced barrister and solicitor, who had been acting for the defendant in litigation in connection with which the letter was written. He and the defendant laid the facts before the Crown Attorney, and the latter approved of the prosecution and directed the issue of a warrant. On the other hand, the plaintiff was a man holding a responsible position, his integrity was unquestioned, and he had denied all knowledge of the letter. The jury found that the defendant was responsible for the prosecution and that there was actual malice on his part:—*Held*, that, while the findings were warranted by the evidence, the action must be dismissed upon the ground that there was reasonable and probable cause for the prosecution.—*Clements v. Ohrly* (1847), 2 C. & K. 686, considered.—*Longdon v. Bilsby* (1910), 22 O.L.R. 4, followed.—But *held*, that the action should be dismissed without costs, because there was malice and because a

warrant was issued for the plaintiff's arrest in a case which at most justified the issue of a summons only. *McMullen v. Wetlaufer*, 178.

MANDAMUS.

See CONSTITUTIONAL LAW — STREET RAILWAYS.

MARRIAGE.

Action for Judicial Declaration of Nullity—Jurisdiction of Supreme Court of Ontario—Judicature Act, R.S.O. 1897, ch. 51, secs. 25, 26, 28, 34—Marriage Act, R.S.O. 1914, ch. 148, secs. 36, 37—Intervention of Attorney-General—Case not Falling under sec. 36—Status of Attorney-General—Application before Trial for Stay of Action—Determination of Question of Law before Trial of Issues of Fact.]—The Supreme Court of Ontario has no jurisdiction to entertain an action brought for the purpose of having declared void a marriage which has been duly solemnised, unless the case can be brought under sec. 36 of the Marriage Act, R.S.O. 1914, ch. 148.—The opinion expressed in *Lawless v. Chamberlain* (1889), 18 O.R. 296, not followed.—The jurisdiction of the Court is as defined by the Judicature Act: see R.S.O. 1897, ch. 51, secs. 25, 26, 28, 34; and does not include, except as specified therein, the jurisdiction formerly possessed by the Ecclesiastical Courts in England.—An action brought in the Supreme Court of Ontario to have a marriage solemnised between the parties declared null and void

and the marriage license obtained by the defendant declared illegal, fraudulent, and void, was forever stayed, upon the application of the Attorney-General for Ontario, who intervened.—It was also held, upon a preliminary objection raised by the plaintiff, that the Attorney-General had the right to intervene under sec. 37 of the Marriage Act, although the case did not fall within sec. 36 of the Act; that the right was not limited to intervention at the trial; and that the interests of the parties would be best served by allowing the legal question of the jurisdiction of the Court to be determined upon the Attorney-General's application, leaving the issues of fact to be tried later if it should be found that the Court had jurisdiction to entertain the action. *Reid v. Aull*, 68.

See DOMICILE—GIFT—TITLE TO LAND.

MARRIED WOMAN.

See HUSBAND AND WIFE—PRACTICE.

MASTER AND SERVANT.

1. *Death of Servant—Action under Fatal Accidents Act—Explosion of Hot Water Range Attachments in Hotel Kitchen—Negligence—Evidence—Employment of Competent Person—Responsibility of Hotel Company for Negligence of Manager—Common Employment—Duty of Master—Reasonable Care—Independent Contractor—Findings of Jury.*]—In an action under the Fatal Acci-

dents Act to recover damages for the death of a servant (head waitress) in the defendant company's hotel, by an explosion of the range or hot water attachments in the kitchen, it appeared that the manager of the hotel had employed a plumber and steam-fitter to make some alterations in the hot water system, and that the alterations were made by this man shortly before the explosion. The jury found: (1) that the defendant company was guilty of negligence which caused the death; (2) that the negligence was, not having the hot water system properly installed and inspected, and that the manager neglected his duty, which was to have the work examined as soon as he found it was not satisfactory; (3) that danger to persons in the kitchen would be reasonably expected to arise from an appliance formed by connecting the water-front with the steam coils, unless measures were adopted to prevent such danger; (4) that the defendant company did not take reasonable care to prevent such danger; (5) that the defendant company exercised reasonable care in employing a manager; (6) that the manager was competent; (7) that the manager did not exercise reasonable care in employing the plumber; (1a) that it was the negligence of the manager and the plumber which led to the explosion; (2a) that the plumber in the construction of the appliance left something undone which led to the explosion; (3a) that the plumber did

something in the construction of the appliance that led to the explosion. There was no claim under the Workmen's Compensation for Injuries Act:—*Held* (CLUTE, J., dissenting), that there was no evidence to support findings 2, 3, and 6, nor finding 1a, so far as it related to the manager, and that these findings should be set aside, and the judgment of BRITTON, J., at the trial, dismissing the action, affirmed. — A householder who employs a competent plumber and steam-fitter to make a connection between his furnace and his kitchen is not answerable for any injury that may be occasioned to his servants owing to the neglect of the plumber to provide some safety device which he erroneously believes to be unnecessary—at all events, unless the householder knows or ought to know of the defect; and in this case there was no evidence of the plumber's incompetency beyond the fact that the work which he did on this occasion was unskilfully done, and there was no evidence that the defendant company or the manager knew that the plumber was incompetent.—The nature and extent of the duty which a master owes to his servants with regard to the place in which and the appliances with which they are called upon to do their work, defined.—*Smith v. Baker & Sons*, [1891] A.C. 325, 362, and *Lovegrove v. London Brighton and South Coast R.W. Co.* (1864), 16 C.B.N.S. 669, 691, 692, specially referred to.—The duty of the employer is not an "absolute duty," except in the

sense that it is a duty which he may not delegate; and in this case the defendant company would be responsible for any neglect on the part of the manager to take reasonable care and provide proper appliances, though as to other matters there would be no liability at common law because the manager was a fellow-servant of the deceased.—*Bergklint v. Western Canada Power Co.* (1914), 50 S.C.R. 39, 67, explained.—The question of the liability of the defendant company for what was done by the plumber, regarding him as an independent contractor, was not considered.—*Per CLUTE, J.*:—There was evidence to support all the findings of the jury. The proximate cause of the explosion was the manager's negligence in directing and permitting the installation without waiting for a plan which would have made it safe. The system was incomplete, and no proper precautions, without which danger was imminent, were taken. And there was nothing in law which, upon the findings and facts, precluded the plaintiffs from having judgment.—Review of the authorities.—*McArthur v. Dominion Cartridge Co.*, [1905] A.C. 72, specially referred to. *Junor v. International Hotel Co. Limited*, 399.

2. *Injury to Servant—Miner Working in Shaft Struck by Bucket and Cross-head — Breaking of Cable—Evidence—Res Ipsa Loquitur — Negligence — Defects — Want of Inspection—Damages.*—The statement in Beven on Neg-

ligence, 3rd ed., p. 130, that the rule of evidence *res ipsa loquitur* does not apply to a case between master and servant, is too broad.—Examination of the cases cited by Beven.—The principle enunciated in *Scott v. London and St. Katherine Docks Co.* (1865), 3 H. & C. 596, 601, 140 R.R. 627, 631, viz., that the inference may be drawn from the happening of an accident, in the absence of explanation by the defendant, that it arose from want of care upon the part of the defendant or his servants, but not necessarily want of care for which the master is responsible to his workman—the master's duty being to take reasonable care and to make reasonable effort to provide a safe place and safe machinery in which and with which the servant is to work, but not to guarantee that place and machinery shall be absolutely safe—is the true one.—In this case—one of personal injury to the plaintiff, working in the defendant company's mine, by a bucket and cross-head falling upon him, because of the breaking of the cable by which the bucket was lifted—it was held, upon the evidence, that the falling of the bucket and cross-head was not due to any negligence on the part of the plaintiff or any of his fellow-servants, but was due to three causes: (1) a defect in the cable; (2) the insufficiency of the clip; and (3) the insufficiency of the stop-blocks; that the defect in the cable might and ought to have been discovered if the cable had been properly inspected; that

either there was no inspection provided for or the person charged with the duty of inspecting was negligent in the performance of it; that the insufficiency of the clip and the stop-blocks was due to the negligence of the defendant company or of the person who was entrusted by it with the duty of seeing that these safeguards were properly provided. And, the accident having happened from one or more of the three causes named or from the combined effect of all three of them, the plaintiff made a case enabling him to recover damages for his injury.—*Haywood v. Hamilton Bridge Works Co. Limited* (1914), 7 O.W.N. 231, and *Hanson v. Lancashire and Yorkshire R.W. Co.* (1870), 20 W.R. 297, distinguished. *Kolari v. Mond Nickel Co.*, 470.

3. *Injury to Servant—Negligence—Electric Current—Escape of Dangerous Element—Evidence—Onus—Findings of Fact of Trial Judge—Duty of Master to Provide Safe Place for Servant to Work in—Negligence of Fellow-servants—Workmen's Compensation for Injuries Act, R.S.O. 1914, ch. 46, secs. 3, 6—Cause of Injury—Defect in Appliances—Reasonable Precautions—Knowledge of Defect.*—The plaintiff was employed by the defendants, under the direction of their officers, in painting a tower, on which were strung the defendants' transmission wires, conveying electricity; he came in contact with a wire charged with electricity, and was severely injured. The part

of the tower, called a "unit," which he was painting, was supposed to be safe; the plaintiff had been assured that the electric current in that unit had been turned off and that the wires were dead. In an action for damages for the plaintiff's injuries, tried without a jury, the trial Judge found, upon the evidence, that the injuries were caused by electric current in the supposed dead unit, and not, as the defendants contended, by the plaintiff touching the live wire on the adjoining unit:—*Held* (RIDDLELL, J., dissenting), that the evidence was sufficient to justify the finding; and, the plaintiff having been sent to a dangerous place, the onus was upon the defendants to satisfy the Court that they were guilty of no negligence; and that they had failed to do.—The system adopted by the defendants did not afford a safe and proper place for the plaintiff to do his work, and the defendants were not relieved from responsibility by the fact that the operations were superintended by a competent foreman.—The principle of *Rylands v. Fletcher* (1868), L.R. 3 H.L. 330, applies to an electric current; and, having regard to the dangerous nature of the current, and the fact that the plaintiff was ordered to go to a place where, if he were not protected by the current being turned off from the wires about which he was to work, there was the greatest possible danger, the responsibility of the defendants to the plaintiff was not less than it would be to a person upon whose

land the defendants had permitted the current to flow.—Review of the authorities.—*Per RIDDELL, J.*:—Had the conclusion of fact been drawn by a jury, it could not stand, as it was much more likely that the plaintiff and his witnesses were mistaken than that any current could be in the wires of the unit upon which the plaintiff was at work. But, assuming that the finding of the trial Judge should stand, if a current was allowed to run in at least one wire of the unit, that was not intended by the defendants, and it must have been the result of negligence or of some inexplicable accident. If of negligence, it must have been that of a fellow-servant, and no action would lie at the common law. If the Workmen's Compensation for Injuries Act, R.S.O. 1914, ch. 46, were appealed to, there was no evidence of the negligence of any person or persons entrusted by the defendants with the duty of seeing that the condition of the works, etc., was proper, and the defendants would not be liable under sec. 6 (a); sec. 3 (e) is not broad enough to cover the case of one in charge of an electric current—railway companies alone are aimed at by it; and, if any servant was negligent, it could not be said that his negligence was the cause of the plaintiff's injury. If the case was one of mere accident, the defendants were equally exonerated. The master does not warrant the safety of the servant's employment; he undertakes only that he will take all reasonable pre-

cautions to protect him against accidents. No further or other precautions than those actually taken were suggested, and it was hard to conceive of a more absolute system of precaution. The common law duty of the master to provide a place reasonably safe for the servant in performing his duty is limited in the manner pointed out in *Bergklint v. Western Canada Power Co.* (1914), 50 S.C.R. 39, and previous decisions of the Supreme Court of Canada; and, having regard to the safety of the defendants' permanent structures and the character of the work, there was no breach of that duty. In order to establish a common law liability it is necessary to prove that the master knew and the servant did not know of the defect in the appliances. The fact that electricity was in question made no difference. *Citizens' Light and Power Co. v. Lepitre* (1898), 29 S.C.R. 1, and *Royal Electric Co. v. Hévé* (1902), 32 S.C.R. 462, answer the contention that the doctrine of *Rylands v. Fletcher* applies. Moreover, it was not proved that the electricity was the product or the property of the defendants; and in any case they had the legal right to have electricity in all of their wires, and were not responsible for its escape in the absence of negligence on their part.—Judgment of FALCONBRIDGE, C.J.K.B., affirmed; RIDDELL, J., dissenting. *Raynor v. Toronto Power Co.*, 612.

4. *Injury to Servant—Negligence of Foreman of Master's*

Works—Dangerous Place—Findings of Jury—Absence of Finding as to Nature of Foreman's Negligence—Finding by Appellate Court on Evidence—Judicature Act, R.S.O. 1914, ch. 56, sec. 27 (2)—Workmen's Compensation or Injuries Act, R.S.O. 1914, ch. 146, sec. 3 (c)—Causa Causans of Injury—Absence of Contributory Negligence.—The plaintiff was injured by the walls of a ditch, in which he was working for the defendants, falling in upon him, and brought this action to recover damages for his injuries. The jury found (2) that the defendants were guilty of negligence causing the injury; (3) that "such negligence" consisted in "negligence on part of foreman;" (5) that the foreman was one whose orders the plaintiff was bound to obey; (6) that the plaintiff had orders from the foreman to work in the ditch; and (7) that the plaintiff himself was not guilty of any act of negligence which led to the accident:—*Held*, upon the evidence, that the foreman was guilty of negligence in sending the plaintiff to work at a place which was known to him to be dangerous; and that the appellate Court should, under sec. 27 (2) of the Judicature Act, R.S.O. 1914, ch. 56, make the finding accordingly which the jury had failed to make, and so affirm the judgment for the plaintiff entered at the trial.—Under sec. 3 (c) of the Workmen's Compensation for Injuries Act, R.S.O. 1914, ch. 146, the obedience of the workman to the orders of one to whose

orders he is bound to conform need not be the *causa causans* of the injury.—*Wild v. Waygood*, [1892] 1 Q.B. 783, followed.—Judgment of the Judge of the District Court of the District of Rainy River affirmed. *Turner v. East*, 375.

5. *Injury to Servant of Municipal Corporation—Explosion of Gas—Duty to Take Reasonable Care—Evidence—Negligence—Res Ipsa Loquitur—Nonsuit.*—The plaintiff, who was employed as a labourer by the defendant, a city corporation, was injured by an explosion of gas in a concrete chamber, which he had entered by the order of his foreman. The chamber was under the pavement of a city street, and had no opening into it except the man-hole by which the plaintiff entered. There was no gas-main in the neighbourhood of the chamber; there was no evidence of any defect in it; it was shewn that no accident of any kind had happened in connection with this chamber or any similar ones, of which there were many, in the city; and there was nothing to indicate the nature of the gas which exploded or to prove whence it came. In an action to recover damages for the plaintiff's injuries, it was contended that the rule of evidence *res ipsa loquitur* applied:—*Held*, that the utmost duty of the defendant corporation was to take reasonable care to provide proper appliances, and to maintain them in a proper condition, and so to carry on its operations as not to sub-

ject those employed by it to unnecessary risk; and there was nothing to warrant the conclusion that the defendant corporation neglected that duty and that the plaintiff's injuries were occasioned by the neglect of it.—*Smith v. Baker & Sons*, [1891] A.C. 325, 362, applied.—*McArthur v. Dominion Cartridge Co.*, [1905] A.C. 72, and *Winnipeg Electric R.W. Co. v. Schwartz* (1913), 49 S.C.R. 80, distinguished.—Judgment of nonsuit entered by the Senior Judge of the County Court of the County of Wentworth, affirmed. *Collier v. City of Hamilton*, 214.

See MINES AND MINERALS—RAILWAY, 5.

MECHANICS' LIENS.

Material-man—Time for Registering Lien — Mechanics and Wage-Earners Lien Act, R.S.O. 1914, ch. 140, sec. 22 (2)—Time when "Last Material" Furnished — Application of Material to Contract—Trifling Item Long after Furnishing of Bulk of Material—Lien not Confined to Last Item.—By sec. 22 (2) of the Mechanics and Wage-Earners Lien Act, R.S.O. 1914, ch. 140, "a claim of lien for materials may be registered before or during the furnishing or placing thereof, or within 30 days after the furnishing or placing of the last material so furnished or placed."—The plaintiff supplied lime to the contractor for the brickwork of a building being put up for the defendant. From the 5th November, 1913, till the 23rd December,

1913, there were items in the plaintiff's account for lime supplied on nearly every day; but after the last date there was no item until the 26th January, 1914, when two bags of lime were delivered, worth 85 cents. The plaintiff's claim for lien was not registered until the 25th February, 1914:—*Held*, upon the evidence, that the lime delivered on the 26th January was for work done under the contract between the contractor and the defendant.—(2) That the validity of the claim for lien was not affected by the fact that the last item, by reference to which the registration was in time, was a small one, and that the material was furnished some time after the bulk. The amendment of the Act in 1896, by 59 Vict. ch. 35, sec. 21 (2), removed any difficulty in this respect.—Review of the authorities before and since the amendment. — (3) That the plaintiff's lien was not confined to the 85 cents, but comprised all the items of his account. It is now immaterial whether the material is furnished under one contract or more; and the right is independent of the completion of the work. *Hurst v. Morris*, 346.

MERGER.

See CONTRACT, 1—JUDGMENT, 1.

MESNE PROFITS.

See TITLE TO LAND.

MINES AND MINERALS.

*Injury to Miner—Explosion of Charge in Drilled Hole—Negligence—Defective System—Evidence—Contributory Negligence—Findings of Jury—Statutory Duty of Mine-owners—Mining Act of Ontario, R.S.O. 1914, ch. 32, secs. 164, 174, 175.]—*The plaintiff was engaged in running a drilling machine in the defendants' mine, and was injured by an explosion from a loaded hole, one of nine which he had himself loaded on the previous day; he knew that there had been only eight reports, and so notified the men in the night-shift, who went into the mine four hours after he left it. When the plaintiff went back to work the next day, he was not notified that the charge in the ninth hole had not yet exploded, and he saw no indication of a missed hole. He had drilled in about two feet when the charge exploded; he stated that he would not have drilled if he had been warned about the missed hole. He was employed by a person to whom the defendants had let a contract for the drilling, but was paid by the defendants, the mine-owners. In an action to recover damages for his injury, the jury found that the injury was the result of negligence on the part of the defendants, in that they had no system of reporting from one shift to another, that they neglected to have proper inspection, and, in the circumstances in which the plaintiff was engaged to do the work, it was their duty to have the work inspected

daily and reported on to the proper officials. The jury also negatived contributory negligence:—*Held*, that the evidence supported the findings of the jury.—*Held*, also (RIDDELL, J., *dubitante*), upon a consideration of the provisions of the Mining Act of Ontario, R.S.O. 1914, ch. 32, especially sec. 164, rules 14, 15, 80, and 98, and secs. 174 and 175, that the duty of seeing that the provisions of the Act are carried out is imposed upon the mine-owner, as well as upon others, and that the defendants were responsible for a disregard of their statutory duty in the working of the shaft where the plaintiff was injured. There was no shift boss, or mine captain, or superintendent other than one who was superintendent at another mine of the defendants, and who visited and inspected the work once or twice a week. Whether the plaintiff was to be regarded as working under the contractor or for the defendants was not important—it was for the defendants to see that the requirements of the statute were carried out.—*Grant v. Acadia Coal Co.* (1902), 32 S.C.R. 427, *Britannic Merthyr Coal Co. v. David*, [1910] A.C. 74, and *Butler v. Fife Coal Co.*, [1912] A.C. 149, specially referred to.—Judgment of KELLY, J., affirmed. *Danis v. Hudson Bay Mines Limited*, 335.

See MASTER AND SERVANT, 2.

MISREPRESENTATION.

See FRAUD AND MISREPRESENTATION.

MORTGAGE.

See LAND TITLES ACT.

MUNICIPAL
CORPORATIONS.

1. *By-law Authorised by Municipal Act, sec. 400, sub-sec. 49—Protection of Public—Infraction of By-law—Boy under Sixteen Permitted by Employer to Drive Horse in Public Streets—Injury to Boy—Breach of Statutory Duty—Cause of Action against Employer—Negligence—Costs.*—A by-law of the City of Toronto, passed pursuant to the clause of the Municipal Act, now R.S.O. 1914, ch. 192, sec. 400, sub-sec. 49, authorising a municipality to pass by-laws to regulate traffic in the public streets, provided that no vehicle should be driven upon any street in the city in charge of any driver less than sixteen years old:—*Held*, that the prohibition of the by-law was not for the protection of the driver, but for the protection of the public; and the breach of it by the employer of a boy under sixteen, in permitting the boy to drive a horse in the public streets, did not give the boy a cause of action against his employer for injury sustained while so driving. —*Fahey v. Jephcott* (1901), 2 O.L.R. 449, *Hagle v. Laplante* (1910), 20 O.L.R. 339, and *Fowell v. Grafton* (1910), 22 O.L.R. 550, distinguished.—*Held*, also, upon the evidence, that the injury was the result of the boy's own carelessness, and was not caused by any negligence on the part of his employer.—The action, as against the employer,

was dismissed, but without costs, because the employer was guilty of an infraction of the statutory provision of the by-law. *Milligan v. Thorn*, 195.

2. *Construction of Sewer in Highway—Necessary Lowering of Gas Pipes—Expense Incurred—Liability for—Rights of Gas Company in Soil—11 Vict. ch. 14—Injurious Affection of Land—Right to Compensation—Municipal Act, R.S.O. 1914, ch. 192, sec. 325.*—Expense incurred by the city corporation in lowering a gas main belonging to the gas company, laid in one of the city highways—such lowering being necessitated by the construction by the city corporation, in the public interest, of a sewer—was *held* not to be recoverable from the company: the soil occupied by the pipes of the company was land taken and held by the company under the provisions of its Act of incorporation, 11 Vict. ch. 14; that land was injuriously affected by the exercise of the power of the city corporation in the construction of the sewer; the company was entitled to compensation for the damages necessarily resulting from the exercise of that power (sec. 325 of the Municipal Act, R.S.O. 1914, ch. 192); and, therefore, the company could not be required to repay to the city corporation the expense incurred. — *Consumers Gas Co. v. City of Toronto* (1897), 27 S.C.R. 453, followed.—Judgment of the County Court of the County of York reversed. *City of Toronto v. Consumers Gas Co.*, 21.

3. *Money By-law—Motion to Quash—Approval of By-law by Railway and Municipal Board—Municipal Act, R.S.O. 1914, ch. 192, sec. 295 (4)—Interpretation of—Approval Certificate Rescinded by Board—By-law Standing Approved when Notice of Motion Served—Right of Court to Enter-tain Motion when Bar Removed—Illegality of By-law—Issue of De-bentures to Raise Money for High School Building.*—As the rights of a plaintiff must be determined as of the teste of the writ of summons by which his action is commenced, so, generally speaking, the rights of an applicant for a summary order quashing a by-law must be determined as of the day of the service of the notice of motion.—Section 295 (4) of the Municipal Act, R.S.O. 1914, ch. 192, provides that where a money by-law of a municipality has been approved by the Ontario Railway and Municipal Board, the validity of the by-law “shall not thereafter be open to question in any court.”—The money by-law which the applicant sought to have quashed had been approved by the Board before the motion was launched; but the motion was enlarged, and, upon application to it, the Board set aside its approval certificate. It was then objected that the by-law could not be quashed, upon the motion launched at a time when the by-law was not “open to question in any court.”—*Held*, that sec. 295 (4) should be interpreted as meaning that the Court cannot question the validity of a by-law

which has been approved by the Board if the approval is in existence when the Court is called upon to decide.—*Semble*, that an action begun which can be met by a plea of estoppel will lie if the estoppel be removed before the matter comes to adjudication: *Goodrich v. Bodurtha* (1856), 72 Mass. (6 Gray) 323; and, although a judgment is not the less an estoppel because it may be reversed on appeal: *Marchioness of Huntly v. Gaskell*, [1905] 2 Ch. 656, 667; the estoppel existing when the proceeding began, but removed before it came up for adjudication, is not to be regarded as a bar.—The objection was overruled; the motion to quash was heard upon the merits; and the by-law in question, which provided for the issue of debentures in order to raise one-half the cost of construction of a new high school building, was quashed, following *Re Fowler and Village of Waterdown* (1914), 7 O.W.N. 309. *Re Harper and Township of East Flamborough*, 490.

See HIGHWAY—LIMITATION OF ACTIONS, 1—MASTER AND SERVANT, 5—NEGLIGENCE—RAILWAY, 6—STREET RAILWAYS.

MURDER.

See CRIMINAL LAW, 3.

NEGLIGENCE.

1. *Children Killed in Gravel-pit Owned by Municipal Corporation—Nuisance—Cause of Death—Duty of Corporation—Knowledge of Children's Resort to Pit—*

Knowledge of Teamster Employed by Corporation — Invitation — Allurement — Evidence — Findings of Jury.—The defendant, a village corporation, owned land just outside the village limits, abutting on a highway and unfenced, from which land it had taken out sand and gravel. The plaintiff's young children went into the pit or excavation thus formed, to play, and were killed by the fall upon them of a piece of impacted earth. L., a teamster, who was employed by the defendant and others to haul sand and gravel from the pit, had taken out a load earlier in the day on which the children were killed. L. knew that children were in the habit of resorting to the pit to play, but there was no evidence that the defendant or any of its officials knew. The plaintiff sought damages for the death of his children:—*Held*, that the excavation made by the defendant constituted a nuisance; but there was no evidence which would warrant a finding that the nuisance was the cause of the children's death; and the plaintiff's right to recover must depend upon his establishing that the defendant owed a duty to the children which it failed to perform, and that their death was occasioned by that failure.—The jury found, *inter alia*: (1) that the plaintiff's children and other children resorted to the pit with the knowledge and permission of the defendant; (2) that, previous to the accident, the defendant had no knowledge, nor should it reasonably have known,

that there was a likelihood of children being injured there; (3) that there was an invitation to the plaintiff's children to enter the pit; (7) that the death was caused by negligence; (8) that the negligence was the defendant's; (9) that it consisted in L. having dug the hole and left it unprotected. The other findings were favourable to the plaintiff, negating contributory negligence, etc.:—*Held*, that the second finding was fatal to the plaintiff's case—even assuming that the third finding was warranted by the evidence.—*Cooke v. Midland Great Western Railway of Ireland*, [1909] A.C. 229, as explained by *Latham v. R. Johnson & Nephew Limited*, [1913] 1 K.B. 398, distinguished.—*Held*, also, that L.'s knowledge of the fact that children were in the habit of resorting to the gravel-pit was not notice to the defendant: L. was not an officer or servant of the defendant, and had neither oversight nor care of the pit intrusted to him.—*Semble*, referring to *Pedlar v. Toronto Power Co.* (1913-4), 29 O.L.R. 527, 30 O.L.R. 581, that, even if knowledge by the defendant were shewn, the plaintiff could not succeed.—Judgment of KELLY, J., reversed. *Robinson v. Village of Havelock*, 25.

2. *Death of Workman in Factory — Action under Fatal Accidents Act — Electric Shock — Liability of City Corporation Supplying Current — Liability of Employer — Evidence.*—The plaintiffs, a widow and her children, brought this

action, under the Fatal Accidents Act, to recover damages for the death of O., the husband and father, by reason, as they alleged, of the negligence of the defendants or one of them. The death of O. was occasioned by an electric shock which he received when he picked up, by the order of his superior, a portable electric lamp in the factory of the defendant company, by which he was employed:—*Held*, upon the evidence, that the defendant city corporation, which supplied electricity to the defendant company, was not liable for the death of O., no defect being shewn in its lighting system and no negligence or want of care in the operation thereof.—*Held*, that the defendant company was liable for the death of O., which was occasioned by its negligence: such negligence consisting in the company's failure to test the insulation of the wire which carried the current to the lamp, and to remedy a defect in insulation, and in the failure to provide means for carrying the lamp safely. *Oskey v. City of Kingston*, 190.

See HIGHWAY, 1, 2—MASTER AND SERVANT—MINES AND MINERALS—MUNICIPAL CORPORATIONS, 1—RAILWAY, 1, 5, 6—SHIP—WATER.

NONREPAIR OF HIGHWAY.

See HIGHWAY, 1.

NONSUIT.

See MASTER AND SERVANT, 5.

NOTICE.

See DITCHES AND WATER-COURSES ACT—VENDOR AND PURCHASER, 3.

NUISANCE.

Noise and Vibration from Operation of Pumps by Electric Power—Injury to Enjoyment of Neighbouring Property—Possibility of Operation by Steam Power—Statutory Authority—Injunction—Damages—Limitation.—The defendant corporation was empowered by statutes (35 Vict. ch. 79 and 41 Vict. ch. 41) to operate a pumping plant and machinery for the purpose of its waterworks. The machinery was at first operated by means of steam power, but afterwards electrical power was substituted:—*Held*, upon the evidence, that the noise and vibration occasioned in the operation of the pumps by electrical power constituted a nuisance, and seriously interfered with the comfort of the plaintiffs in the enjoyment of their house situate close to the pumping station. — And *held*, that, as it was not shewn that the machinery could not be operated unless driven by electrical power, and as the use of electrically-driven machinery was not expressly authorised by the statutes, the nuisance was not justified by statutory authority.—*Semble*, that, if it had been shewn that the machinery could not be operated unless driven by electrical power, that mode of operation would be regarded as authorised by the statutes; and *quære*, whether the same result would

not follow if it were commercially impracticable to use any other power.—*Jones v. Festiniog R.W. Co.* (1868), L.R. 3 Q.B. 733, and *West v. Bristol Tramways Co.*, [1908] 2 K.B. 14, applied.—*Held*, also, a proper case for awarding damages in lieu of an injunction; but the damages should be limited to the injury suffered by the use of electrically-driven machinery beyond that which would have been sustained if steam power had been used.—Judgment of MIDDLETON, J., varied. *Chadwick v. City of Toronto*, 111.

See HIGHWAY, 2 — NEGLIGENCE, 1—STREET RAILWAYS—WATER.

NULLITY.

See MARRIAGE.

OBSTRUCTION OF HIGHWAY.

See HIGHWAY, 2.

ONTARIO RAILWAY AND MUNICIPAL BOARD.

Jurisdiction—Appeal to Board Directly from Decision of Court of Revision Confirming Assessment—Right of Appeal—Interpretation of Statutes—Leave to Appeal to Supreme Court of Ontario, Appellate Division—Refusal of.—An application by the company for leave to appeal from an order or decision of the Ontario Railway and Municipal Board, of the 16th June, 1914, dismissing, upon the ground of want of jurisdiction, an appeal directly to the Board by the company from the decision of the Court of Revision

of a town in a territorial district. confirming the company's assessment in respect of property in the town for 1913, the appeal having been launched before the 1st July, 1913, was refused; it being *held*, that the appeal to the Board was not competent, and that the Board rightly determined that it had no jurisdiction to hear it.—*Re Fort Frances Assessment* (1913), 27 O.L.R. 622, referred to.—Consideration of the following enactments of the Ontario Legislature: the Assessment Act, R.S.O. 1897, ch. 224, secs. 75, 84; the Act respecting the Establishment of Municipal Institutions in Territorial Districts, R.S.O. 1897, ch. 225, secs. 40-59; the Assessment Act, 4 Edw. VII. ch. 23, sec. 76; 4 Edw. VII. ch. 24, sec. 5; 5 Edw. VII. ch. 24, secs. 1, 2, 3; the Ontario Railway and Municipal Board Act, 6 Edw. VII. ch. 31, secs. 43, 52; 10 Edw. VII. ch. 88, sec. 18; the Assessment Amendment Act, 1913, 3 & 4 Geo. V. ch. 46, sec. 13; the Municipal Act, 1913, 3 & 4 Geo. V. ch. 43; the Ontario Railway and Municipal Board Act, 1913, 3 & 4 Geo. V. ch. 37. *Re Ontario and Minnesota Power Co. and Town of Fort Frances*, 235.

See MUNICIPAL CORPORATIONS, 3—STREET RAILWAYS.

PARLIAMENTARY ELECTIONS.

Recount of Ballots — Ballot Paper Marked in Ink—Ontario Election Act, R.S.O. 1914, ch. 8, sec. 102 — Ballot Papers not Stamped by Returning Officer — Sec. 71 (2)—Imperative or Direc-

tory Provisions—Curative Section, 114 — Ballot Papers Irregularly Marked — Discrepancy between Number of Ballot Papers Marked and Number Issued—Poll Book—Declined and Rejected Ballots—Form of Return.—Upon appeals by both candidates from the decision of a County Court Judge upon a statutory recount of the ballots cast at a provincial election, it was *held*:—(1) That a ballot paper marked by the voter in ink should be counted, although sec. 102 of the Election Act, R.S.O. 1914, ch. 8, directs that the voter shall mark his ballot, “making a cross with a black lead pencil;” the direction is not imperative.—*The Wigtown Case* (1874), 2 O’M. & H. 215, 223, followed.—(2) That ballot papers not stamped by the returning officer in the manner required by sec. 71 (2) of the Act, though marked by voters and deposited, should not be counted: the provision is imperative; and the saving section, 114, does not apply to the returning officer.—*The Thornbury Case, Ackers v. Howard* (1886), 16 Q.B.D. 739, distinguished.—Review of the authorities on the question whether a statutory provision is imperative or merely directory.—(3) That a ballot paper on which were two marks in the form of a $\overline{\text{T}}$, the two lines not touching, should not be counted.—(4) That a ballot marked ∇ , the rest of the cross being apparently torn off, should be counted.—(5) That a ballot paper with the word “for” written after the cross should be counted.—(6) That a

ballot paper properly marked for one of the candidates, but with a cross on the back opposite the deputy returning officer’s initials, should be counted.—(7) That a ballot paper marked for both candidates, with a mark on the cross opposite the name of one, perhaps intended as an erasure, should not be counted.—(8) That a ballot paper marked with a plain cross, not coloured with pencil or ink, probably made with a worn and defective pencil, should be counted.—(9) That, where the poll book in a subdivision shewed that only 200 ballot papers were issued, but 201 ballot papers properly marked were found in the box, they should all be counted: in a recount the ballot is to be looked at and not the poll book.—(10) That a ballot paper marked with a cross to the right of the name of one of the candidates, with some irregular pencil markings under his name, should be counted, none of the markings being such as to identify the voter.—(11) That a ballot paper marked with two strokes, the second a repetition of the first, but not quite covering it, not amounting to either a ∇ or a cross, should not be counted.—(12) That a ballot paper marked with two crosses, one opposite the name of each candidate, should not be counted, although one cross was somewhat paler than the other.—(13) That a ballot paper marked with a cross opposite the name of one candidate, and a line, apparently marked out, opposite the name of the other, should be

counted for the first.—(14) That a ballot paper marked with a cross containing three strokes in the centre of the name of one of the candidates, should be counted. This paper was returned by the deputy returning officer as a declined ballot; but the ballot is to be looked at and not the return: see form 21 and secs. 117 and 138 of the Act.—(15) That a ballot paper marked with a cross, but having the figures 83 before the deputy returning officer's initials on the back, should be counted.—(16) That ballot papers having no cross upon their face but a cross on the back should not be counted.—(17) That a ballot paper marked with a straight line instead of a cross should not be counted.—(18) That a ballot paper marked with a cross and a further line making a star should be counted.—(19) That a ballot paper marked with a cross opposite the name of one of the candidates, with a straight line in pencil under part of his name, should be counted. *Re South Oxford Provincial Election, Mayberry v. Sinclair, Sinclair v. Mayberry*, 1.

PARTIES.

See COMPANY—CONTRACT, 1—STREET RAILWAYS.

PARTNERSHIP.

Account—Profits of Separate Business Carried on by one Partner—Assent of other Partner—"Competing" Business—Evidence—Sale of Property of Firm after Death of one Partner—Bona Fides of Purchaser—Assistance Given

by Surviving Partner—Liability to Account for Profits on Resale—Compensation to Surviving Partner for Services in Liquidation—Trustee—Trustee Act, R.S.O. 1897, ch. 129, sec. 40—Application of 1 Geo. V. ch. 26, sec. 66.]—

(1) A partner must account to his firm for the profits made by him in any business of the same nature as and competing with that of his firm if he carries on any such business without the consent of his partners; but *held* (HODGINS, J.A., dissenting), affirming on this point the judgment of MIDDLETON, J., 26 O.L.R. 246, that, assuming that the business carried on by the defendant in Michigan was of the same nature as and competing with the partnership business carried on by the defendant and his brother, since deceased, the evidence established that it was carried on with the consent of the latter.—*Per* Hodgins, J.A.:—The business carried on in Michigan was a competing one. Competition in fact is not the final test, but rather the sameness of the business as transacted with that being carried on by the main concern. The business carried on in Michigan was within the scope of the partnership business, the dealings were with the same customers in the same commodities, and the business competed with the firm in sales. Not merely knowledge on the part of the deceased partner that the competing business was being carried on should be shewn, but acquiescence or assent to its being carried on for the benefit of others;

and the evidence failed to shew that the deceased partner consciously agreed to what was being done.—(2) There was no evidence of any consent by the defendant's brother and partner to the defendant engaging in the W. H. & Co. business on his own account; and the judgment of MIDDLETON, J., as to this, was reversed.—(3) There was nothing wrong in morals or law in the defendant providing the money which the purchaser of a certain oil mill property of the partnership required to enable him to acquire the property and carry on the business. A surviving partner, who lends his credit to a *bonâ fide* purchaser of partnership property, is not to be treated, for that reason, as the real purchaser, even though the purchase would not and could not have been made but for the lending of his credit. And the conclusion that the defendant was the real purchaser of the business was unwarranted. The judgment of MIDDLETON, J., in regard to the liability of the defendant in respect of the oil mill property, was affirmed (HODGINS, J.A., *dubitante*), but upon a different ground.—(4) The defendant was not entitled to compensation for his services as surviving partner in winding up the affairs of the partnership—he was not a trustee, not even an implied or constructive trustee, and did not come within the provisions of the Trustee Act; even if he were an implied or constructive trustee, he would not come within sec. 40 of R.S.O. 1897,

ch. 129; and *quære*, whether sec. 66 of 1 Geo. V. ch. 26, which came into force on the 1st June, 1911, would be applicable to his services before that date. The judgment of MIDDLETON, J., upon this point, was affirmed.—*Knox v. Gye* (1872), L.R. 5 H.L. 656, *Farrar v. Farrars Limited* (1888), 40 Ch.D. 395, and *Omnium Electric Palaces Limited v. Baines*, [1914] 1 Ch. 332, specially referred to. *Livingston v. Livingston*, 440.

PATENT FOR INVENTION.

See FRAUD AND MISREPRESENTATION.

PLAN.

See CROWN PATENT.

PLEADING.

See INNKEEPER, 1.

PRACTICE.

Ex Parte Order—Leave to Issue Execution—Extending Time for Moving against Order—Setting aside Order—Unsatisfied Judgment—Loss of Remedy—Limitation of Actions—Discretion—Appeal—Rules 176, 213, 216, 217—Personal Judgment against Married Woman—Nullity.—A judgment for the payment of money by the defendant was pronounced in favour of the plaintiff on the 19th April, 1894, but was not entered until the 15th April, 1914; on that day an order was made by the Master in Chambers, on the *ex parte* application of the plaintiff, allowing him to issue execution on the judgment;

and execution was issued accordingly. There was no doubt that the judgment was unsatisfied. The defendant moved to set aside the order, but not within the time allowed by Rule 217. The Judge who heard the motion extended the time under Rule 176, and set aside the Master's order on the ground that it was improperly made *ex parte*:—*Held*, notwithstanding that the judgment was unsatisfied, and that the right to enforce it might be lost by the plaintiff's slip, that the Judge's order was right, and could not be reversed on appeal—Rule 213 being explicit as to the necessity for notice of the application being given to the defendant, and the case not falling under Rule 216.—*Held*, also, that the appellate Court could not interfere with the discretion exercised by the Judge in extending the time for moving.—*Seemle*, that the judgment entered against the defendant, who was a married woman, though a personal judgment, instead of a proprietary one, was not a nullity.—Order of FALCONBRIDGE, C.J.K.B., affirmed. *Joss v. Fairgrieve*, 117.

See ALIEN ENEMY—COMPANY
—CONTRACT, 1—CRIMINAL LAW,
1—JUDGMENT, 2—MARRIAGE.

PREFERENCE.

See INJUNCTION.

PRESUMPTION.

See INSURANCE — TITLE TO
LAND.

PRINCIPAL AND AGENT.

Agent's Commission on Sale of Land—Written Agreement—Fixed Price and Time for Selling—Subsequent Departure from Agreement—Evidence—General Employment—Introduction of Purchaser—Refusal of Principal to Accept Price Offered—Subsequent Acceptance and Sale by Principal without Intervention of Agent—Rate of Commission—Damages—Arrangement to Divide Commission with Purchaser's Agent—Effect of.—The defendant, the owner of land and a building thereon, on the 20th August, 1913, signed a writing addressed to the plaintiff, in which the property was described and it was said, "I beg herewith to give you an option for thirty days on this property . . . 59½ feet, at \$1,300 per foot, and \$30,000 for the building," i.e., \$107,350, stating the terms of payment. The plaintiff was a real estate agent or broker, and he made an arrangement with the defendant for a commission of 5 per cent., afterwards reduced to \$5,000, if he sold the property. The plaintiff found a purchaser who was willing to give \$100,000; but the defendant, when the plaintiff endeavoured to induce him to accept that price, less a commission, said that he would not take less than \$100,000 net. The defendant afterwards, within the thirty days, sold the property for \$100,000 to the purchaser introduced by the plaintiff, dealing directly with the purchaser:—*Held* (MEREDITH, C.J.O., dissenting), that the fair result of the

evidence was that, while the option named a price and time for sale, it was understood that, if the plaintiff could effect a sale at a less price, the plaintiff might accept it, and if more time were needed he would give it; that the plaintiff had a general authority; that what happened during the negotiations (set forth in the judgments) did not affect the right of the plaintiff to get a commission on the sale afterwards made; and that, the defendant having himself made the sale to the purchaser introduced by the plaintiff, the plaintiff was entitled to a commission of 5 per cent. (the rate originally fixed) upon the sale-price, or to damages, the measure of which might well be the stated percentage applied to the reduced amount.—*Toulmin v. Millar* (1887), 58 L.T.R. 96, and *Burchell v. Gowrie and Blockhouse Collieries Limited*, [1910] A.C. 614, applied.—*Held*, also, that the plaintiff had not forfeited his right to a commission by an arrangement made by him to divide it with the agent of the purchaser. The reason of the rule which prevents an agent from succeeding unless his action is free from the taint of dishonesty is, that he cannot give true service unless he is free from an actual or possible contrary interest; and that rule does not apply to a case where the sale has not actually been made as the result of the agent's negotiation, of which the arrangement with the purchaser's agent was a part.—*Andrews v. Ramsay*, [1903] 2 K.B. 635, distinguished.—*Hip-*

pisley v. Knee Brothers, [1905] 1 K.B. 1, and *Nitedals Taendstik-fabrik v. Bruster*, [1906] 2 Ch. 671, applied.—*Per* MEREDITH, C. J.O.:—Upon the evidence, the plaintiff's employment was a limited one, to find a purchaser at the price of \$107,350 within thirty days. This the plaintiff did not do. The claim for the agreed commission, therefore, failed; and there was no ground upon which a claim for a different rate of remuneration could be supported. The proper conclusion upon the evidence was, that \$100,000 was the utmost that the purchaser would give for the property; and, as there was no suggestion of any other buyer, the plaintiff lost nothing by the action of the defendant in making a bargain with the purchaser before the expiry of the thirty days; and the plaintiff could not succeed upon his alternative claim for damages for having been thus prevented from earning his commission.—Judgment of FALCONBRIDGE, C.J.K.B., reversed; MEREDITH, C.J.O., dissenting. *Hunt v. Emerson*, 532.

See RAILWAY, 2.

PROCLAMATION

See ALIEN ENEMY.

PROFITS.

See PARTNERSHIP.

PROMISSORY NOTE.

Completion and Delivery — Transfer to Bank by Payee before Maturity—Collateral Security — Value—Absence of Notice of De-

fect—Holder in Due Course—Lien—Extent of—Bills of Exchange Act, sec. 54 (2)—General Banker's Lien—Exclusion by Special Memorandum—Evidence.]—The defendant made a promissory note for \$250 in favour of a customer of the plaintiff bank; the note was transferred by the customer to the bank as collateral security to a draft for \$150, which was discounted by the bank for the customer, the proceeds, \$149.60, being placed to his credit. This draft was not accepted or paid. The customer had in fact no right to pledge the note, but should have given it up to the defendant:—*Held*, upon the evidence, that the note was completed by the defendant and delivered as a promissory note, and was given to the bank, before maturity, for value, without notice of any defect; and so the bank became the holder in due course, and was entitled to recover from the defendant thereon to the extent of its lien, *i.e.*, \$149.60 and interest: Bills of Exchange Act, sec. 54, sub-sec. 2.—The \$150 draft had on its face, embodying the terms on which it was negotiated, and stamped by an official of the bank when it was negotiated, the words: "Surrender documents attached on payment of draft only."—The only document attached was the \$250 note:—*Held*, that the bank had no general banker's lien on the note, and was not entitled to collect from the defendant and retain a sum which it had paid for costs in respect of other com-

mercial paper given to it by the customer, even if there had been evidence that the customer was liable for those costs or had acknowledged or promised to pay them.—Judgment of MORRISON, Jun. Co. C.J., York, varied. *Sterling Bank of Canada v. Zuber*, 123.

See LIMITATION OF ACTIONS, 2.

PROVISIONAL DIRECTORS.

See BANKS AND BANKING.

PROXIMATE CAUSE.

See RAILWAY, 5.

QUEBEC LAW.

See DOMICILE.

RAILWAY.

1. *Burning Worn-out Ties on Right of Way—Damage by Spread of Fire—Negligence—Common Law Liability—Statutory Time-limit on Action—"Injury Sustained by Reason of the Construction or Operation of the Railway"*—*Railway Act, R.S.C. 1906, ch. 37, sec. 306—Duty Imposed by sec. 297.*]—*Held* (affirming the judgment of MIDDLETON, J., 31 O.L.R. 419), that the injury done to the plaintiff by the defendant company setting out fire on its right of way for the purpose of destroying worn-out ties, and failing to prevent its spread to his land, was an injury caused by the "operation of the railway," and the time-limit for bringing an action therefor, imposed by sec. 306 of the Railway Act, R.S.C. 1906, ch. 37, was applicable.—The phrase "operation of

the railway" in that section is not used in the narrow sense of running trains; the section applies where the damage or injury "arises from the execution or neglect in the execution of the powers given to or assumed by the company for enabling them to construct or maintain their railway" (*per* OSLER, J.A., in *Ryckman v. Hamilton Grimsby and Beamsville Electric R.W. Co.* (1905), 10 O.L.R. 419, at p. 427).—By sec. 297 of the Railway Act, the duty is imposed upon a railway company of at all times maintaining and keeping its right of way free from dead grass, weeds, and other unnecessary combustible matter, and it was in performing that duty that the injury to the plaintiff was done. If the mode in which the work was done was negligent or unlawful, the railway company was answerable for the damage which the plaintiff suffered; but the act was none the less an act done in the course of, and the injury to the plaintiff was none the less an injury sustained by, the "operation of the railway."—*Prendergast v. Grand Trunk R.W. Co.* (1866), 25 U.C.R. 193, *Ryckman v. Hamilton Grimsby and Beamsville Electric R.W. Co.*, 10 O.L.R. 419, *Grant v. Canadian Pacific R.W. Co.* (1904), 36 N.B.R. 528, and *Canadian Northern R.W. Co. v. Robinson* (1910), 43 S.C.R. 387, [1911] A.C. 739, distinguished.—*McCallum v. Grand Trunk R.W. Co.* (1870-1), 30 U.C.R. 122, 31 U.C.R. 527,

followed. *Greer v. Canadian Pacific R.W. Co.*, 104.

2. *Carriage of Goods*—"Settlers' Effects"—*Reduced Rate*—*Contract*—*Scope of Agent's Authority*—*Legality of Contract*—*Railway Act, R.S.C. 1906, ch. 37, sec. 341.*—Goods carried by the defendant railway company for the plaintiff were settlers' effects, and were so described in the bill of lading. The company's agent at the shipping-point inadvertently stated a rate lower than the plaintiff was charged at the delivery-point. He paid, under protest, the amount demanded, and brought this action to recover the excess:—*Held*, that, the contract for the transportation of the goods having been fully performed, and the fixing of the rate being within the apparent scope of the agent's authority, the contract governed the right to recovery, unless it was contrary to the Railway Act of Canada.—And *held*, that the contract was not contrary to the statute, the fixing of a specific "reduced rate" for one lot of "settlers' effects" being authorised by sec. 341 (b)—though it was contended that the section applied only to a rate made upon all settlers' effects and open to all persons shipping them.—Section 341 is intended to deal with exceptional cases of traffic upon a wholly different basis from that underlying the tolls and tariff sections, which cover the main general business of railway companies.—Sections 77, 315, 317, 319, 320, 326, and *City of Toronto*

v. *Grand Trunk R.W. Co. and Canadian Pacific R.W. Co.* (1910), 11 Can. Ry. Cas. 365, considered.—Judgment of the County Court of the County of Kent affirmed. *Watson v. Canadian Pacific R.W. Co.*, 137.

3. *Expropriation of Land—Residential Property—Value—Evidence—Sale of Neighbouring Property for Subdivision—Taking Strip of Land on River Front—Deprivation of Access to River—Award—Appeal—Jurisdiction of Court—Increase in Amount Awarded.*—The claimant owned 14 acres of land, about two miles from a city; the land bordered on a river; and the appellant had built upon the property a dwelling-house at a cost of \$18,000. The railway company took $1\frac{6}{10}$ acres, extending across the whole of the river front:—*Held*, upon appeal from an award of compensation made by arbitrators under the Railway Act of Canada, that, the only reliable evidence of the selling value of the property being testimony shewing the recent sale of a neighbouring property to a syndicate for subdivision purposes, the price per acre paid upon that sale should be adopted as the value of the land taken.—*Falconer v. The Queen* (1859), 2 Can. Ex. C.R. 82, followed.—(2) That the obstruction of the claimant's right of access to the river was a proper and important subject of compensation; the damage was to the whole of the property as such, used as it was, and as an entire block, of which a part was

taken.—*The Queen v. Buffalo and Lake Huron R.W. Co.* (1864), 23 U.C.R. 208, and *The Queen v. Carrier* (1888), 2 Can. Ex. C.R. 36, followed.—(3) That for the loss of access to the river, the loss of the attractive feature of a river front, and the loss of a spring interfered with by the railway, 10 per cent. of the value of the house and land was a reasonable sum to allow.—(4) That it was competent for the Court, apart from the jurisdiction given by the Railway Act, to act upon its own view of the evidence in dealing with the amounts allowed by the arbitrators.—*Re Macpherson and City of Toronto* (1895), 26 O.R. 558, approved and followed.—The amount of the award was increased from \$4,250 to \$6,897.50. *Re Muir and Lake Erie and Northern R.W. Co.*, 150.

4. *Expropriation of Land—Taking Part of Golf Course—Compensation—Value of Land—Advantageous Use—Cost of Acquiring Additional Land—Award—Appeal—Increase in Amount—Allowance for Reconstruction of Course—Damage to Club-house from Railway.*—The railway company having taken $8\frac{8}{10}$ acres out of 76 acres belonging to the club and laid out as a golf course, and having by the construction of the railway severed $6\frac{3}{4}$ acres from the rest, it was *held*, that the club were not bound to put up with such a course as could be laid out on the 67 acres left, nor to play over the railway lands; and the cost of acquiring other premises (15 acres), suitable and

convenient, was a fair test of the damage suffered by the club.—*The Queen v. Burrow, Metropolitan R.W. Co. v. Burrow* (1884), *London Times* 24th January and 22nd November, 1884, Boyle and Waghorn on Compensation, p. 1052, and Hudson on Compensation, p. 1521, and *City of Edinburgh v. North British R.W. Co., Princes' Street Gardens Arbitration* (1892), Hudson, p. 1530, applied.—Where the most advantageous use has been made of property by its owner, it is that value that the taker must pay, and the taker cannot reduce that value by limiting the damage to what lies immediately near the part taken, if the owner suffers through his whole property by its being reduced to an area too restricted to be used to the same advantage as that which the whole afforded.—The award of arbitrators of \$7,240 as compensation to the club for land taken for the railway, under the Railway Act of Canada, and land injuriously affected, was increased on appeal to \$18,059, allowance being made for the acquisition of additional acreage, for sewer piping, etc., taken and rendered useless, for reconstructing and providing tees and greens and for damage to the club-house from smoke, noise, and vibration. *Re Brantford Golf and Country Club and Lake Erie and Northern R.W. Co.*, 141.

5. *Injury to Servant—Conductor of Freight Train—Negligence—Defective Ladder—Breach of Statutory Duty—Railway Act,*

R.S.C. 1906, ch. 37, sec. 264 (5)—Proximate Cause of Injury—Conductor's Disobedience of Company's Rules—Contributory Negligence—Findings of Fact of Trial Judge—Appeal.]—The plaintiff was the conductor of a freight train of the defendants; when the train was leaving a station, the plaintiff, contrary to the defendants' rules, jumped on the train while it was in motion, and proceeded along the tops of the cars in order to reach the caboose; he then attempted to descend by a ladder attached to one of the cars. This ladder was in a defective condition; the defendants' inspector had turned up the stirrup at the bottom to indicate that it was not to be used; and the car was on its way to the repair-shop. The plaintiff was not told of the defect in the ladder, but he knew that the car was on its way to the repair-shop. When he stepped on the ladder, it gave way, and he fell and was injured. In an action for damages for his injuries, tried without a jury, the trial Judge found that the plaintiff's injuries were caused by the defective ladder; that it was a part of the equipment of the train; that the plaintiff's infraction of the rules in getting on the moving train was not the proximate cause of his injuries; and that the defendants had not established that the plaintiff was guilty of negligence without which the accident would not have happened:—*Held* (RIDDELL, J., dissenting), that the findings of the trial Judge were warranted by the

evidence; that there was a breach of a statutory duty on the part of the defendants in sending out the car with a defective ladder (Railway Act, R.S.C. 1906, ch. 37, sec. 264, sub-sec. 5); and that the breach was the proximate cause of the injuries sustained by the plaintiff.—*Fawcett v. Canadian Pacific R.W. Co.* (1901-2), 8 B.C.R. 393, 32 S.C.R. 721, *Truman v. Rudolph* (1895), 22 A.R. 250, *Deyo v. Kingston and Pembroke R.W. Co.* (1904), 8 O.L.R. 588, *Grand Trunk R.W. Co. v. Birkett* (1904), 35 S.C.R. 296, and *Cook v. Grand Trunk R.W. Co.* (1914), 31 O.L.R. 183, distinguished.—*Stone v. Canadian Pacific R.W. Co.* (1913), 47 S.C.R. 634, followed.—*Per RIDDELL, J.*:—There is no such thing as negligence at large: actionable negligence is breach of a duty owed to the person complaining. The car was plainly a damaged article and so represented—not really part of the “plant,” but being taken as freight to the repair-shop. There was nothing in the plaintiff’s employment calling for him to run along the top of the cars to get to his caboose, and the defendants had no reason to suspect that he would do so. There was no negligence towards the plaintiff; and the statutory requirements as to ladders on cars have no reference to a car placed in a train to be taken to the repair-shop. Every necessary precaution was taken that the plaintiff should know, and he did know, all that was necessary about the car. The plaintiff was going to

his proper place in the train by a way not contemplated by the defendants, and which was used only because he had already violated the law. In doing this he used a ladder which was out of commission, and its use forbidden by the bending up of the stirrup; and that was the direct and immediate cause of his injuries. The act of so using an appliance on a damaged car, without any examination, was contributory negligence.—Judgment of FALCONBRIDGE, C. J. K. B., affirmed. *Smith v. Grand Trunk R.W. Co.*, 380.

6. *Level Highway Crossing in City—Destruction of Fire Truck by Collision with Engine of Train—Injury to Fireman—Negligence—Contributory Negligence—Findings of Jury—Evidence—Rule Made by City Corporation after Collision — Admissibility — Grounds for and against—Substantial Wrong or Miscarriage not Occasioned—Judicature Act, sec. 28—Evidence as to Condition of Head-light on Engine—Admissibility—Effect—“Imminent Danger.”*—The city corporation claimed damages for the destruction of their motor fire truck on its way to a fire, by a collision with the locomotive engine of a train of the defendants at a place in the city where the railway crossed W. street, on the street level; and S., who was a fireman employed by the city corporation and was in the truck at the time of the collision, claimed damages for personal injuries sustained by him by reason of

the collision. The actions were tried together, and the jury, in answer to questions, found: (1) that the collision resulted from negligence; (2) that there was negligence on the part of the defendants or their servants which caused or contributed to the collision; (3) that that negligence was, that the switchman and other employes of the defendants who were standing at the corner of M. street and K. street, and saw the fire truck pass along K. street, going towards W. street, "should have used what power they had at their disposal to have cleared W. street, believing the fire truck might go down that street, employees knowing that the fire was on the south side of the track, also knowing that 93, a special, was coming from the east;" (4) that the city corporation or their servants could, by the exercise of reasonable care, have avoided the collision; (5) "that the firemen might have stopped the fire truck and made sure the railway crossing was clear, knowing same crossing was a dangerous crossing, also knowing the railroad had the right of way;" (6) that the plaintiff S. could not, by the exercise of reasonable care, have avoided the accident or injury which happened to him. Upon these findings, the trial Judge dismissed the action of the city corporation, and gave judgment for the plaintiff S. for the sum assessed by the jury for his damages. The city corporation appealed in the first action, and the defendants in the second

action:—*Held* (CLUTE, J., dissenting), that there was no evidence to sustain the 3rd finding of the jury; that the jury, having found no other negligence than that mentioned in the 3rd finding, must be taken to have negatived all other negligence; and, therefore, there being no negligence, the action of the city corporation was properly dismissed, and the action of the plaintiff S. should be dismissed also.—*Seemle, per* RIDDELL and SUTHERLAND, JJ., that, if the defendants had been negligent, the plaintiff S. would have been entitled to hold his judgment, for he was not in charge of the truck, and there was no evidence that personally he was guilty of any negligence.—*Thorogood v. Bryan* (1849), 8 C.B. 115, has been overruled by *Mills v. Armstrong* (1888), 13 App. Cas. 1.—*Per* CLUTE, J.:—There was evidence of negligence in regard to the conduct of the employees of the defendants which could not have been withdrawn from the jury, and it could not be said as a matter of law that the answer to the 3rd question did not amount to a finding of negligence. The 3rd finding standing, the plaintiff S. was entitled to hold his judgment, the jury having by the 6th finding absolved him of contributory negligence.—*Per* RIDDELL and SUTHERLAND, JJ.:—When the defendants' servants saw the truck drive rapidly past M. street along K. street, they had no reason to apprehend that a collision was imminent or even likely.—Discussion of the doc-

trine of "imminent danger" and review of the authorities.—*Held*, also, *per Curiam*, that the 4th and 5th findings of the jury were warranted by the evidence; and the city corporation, being thus found guilty, by their servants, of contributory negligence, could not succeed even if the 3rd finding stood.—*Per CLUTE, J.*:—Evidence that, after the collision, a rule was made and put into effect by the city corporation, requiring the driver of the truck, when proceeding to a fire, to stop before crossing the railway track, was improperly admitted; but the admission of it did not occasion any substantial wrong or miscarriage: sec. 28 of the Judicature Act, R.S.O. 1914, ch. 56.—*Per RIDDELL, J.*:—The evidence was properly admitted, not on the ground urged at the trial, but for the purpose of shewing what the firemen might do without interfering with their efficiency—without delaying too long their advent at the fire.—*Per SUTHERLAND, J.*:—The evidence was not admissible on the ground put forward at the trial, viz., that the passing of the rule shewed what the city corporation considered good practice; but it appeared that the evidence did not influence the jury in coming to the conclusion expressed by the 5th finding; and that finding should not, therefore, be disturbed: Judicature Act, sec. 28.—*Per RIDDELL and SUTHERLAND, JJ.*:—Though evidence of the condition of the head-light upon the defendants' engine when it arrived at a certain place, some

time after the collision, may have been improperly received—without proof that there had been no change in the meantime—that evidence was unimportant in view of the testimony of a large number of witnesses that the light was plainly visible immediately before the collision. *City of London v. Grand Trunk R.W. Co., Summers v. Grand Trunk R.W. Co.*, 642.

See CARRIERS—STREET RAILWAYS.

REASONABLE AND PROBABLE CAUSE.

See MALICIOUS PROSECUTION.

RECOUNT.

See PARLIAMENTARY ELECTIONS.

REGISTRY LAWS.

See LAND TITLES ACT—MECHANICS' LIENS.

RES IPSA LOQUITUR.

See MASTER AND SERVANT, 2, 5.

RESCISSION.

See FRAUD AND MISREPRESENTATION—VENDOR AND PURCHASER.

RESTRAINT OF TRADE.

See COVENANT.

ROAD.

See HIGHWAY.

ROMAN CATHOLIC SEPARATE SCHOOLS.

See CONSTITUTIONAL LAW.

RULES.

(Consolidated Rules of the Supreme Court of Ontario, 1913.)

Rules 56, 57.]—*See* JUDGMENT, 2.

Rule 67.]—*See* COMPANY — CONTRACT, 1.

Rule 134.]—*See* COMPANY — CONTRACT, 1.

Rule 165.]—*See* COMPANY.

Rule 176.]—*See* PRACTICE.

Rules 213, 216, 217.]—*See* PRACTICE.

Rule 320.]—*See* CONTRACT, 1.

**RULES OF 1908
(CRIMINAL CODE).**

See CRIMINAL LAW, 1.

SALE OF GOODS.

See CARRIERS.

SALE OF LAND.

See INFANT, 1—JUDGMENT, 1—
PRINCIPAL AND AGENT—VENDOR
AND PURCHASER.

SCHOOLS.

See CONSTITUTIONAL LAW—
MUNICIPAL CORPORATIONS, 3.

SECURITY FOR COSTS.

See ALIEN ENEMY, 1.

SEPARATE SCHOOLS.

See CONSTITUTIONAL LAW.

SET-OFF.

See TITLE TO LAND.

SETTLERS' EFFECTS.

See RAILWAY, 2.

SEWER.

See MUNICIPAL CORPORA-
TIONS, 2.

**SHARES AND SHARE-
HOLDERS.**

See BANKS AND BANKING—
TRUSTS AND TRUSTEES.

SHIP.

Collision of Ships in Inland Waters—Action for Damages—Jurisdiction of Supreme Court of Ontario — Negligence — Evidence — Findings of Fact of Trial Judge — Appeal—Contravention of Art. 29—Damages—Both Parties at Fault — Apportionment—Canada Shipping Act, R.S.C. 1906, ch. 113, sec. 918.]—The Supreme Court of Ontario has jurisdiction to entertain an action for damages for negligence resulting in the collision of two vessels in inland waters. — Judgment of MIDDLETON, J., 31 O.L.R. 113, affirmed.—Where both vessels in collision are found in fault, sec. 918 of the Canada Shipping Act, R.S.C. 1906, ch. 113, is applicable, and the damages are to be borne equally by the two vessels. —The action was for damages for injury to the plaintiff's schooner by a collision with the defendant's mud-scow, in a river in the Province of Ontario, owing to the defendant's negligence. The defendant alleged negligence of the plaintiff, and counter-claimed damages for injury to his vessel. The action and counterclaim were tried by BOYD, C., who found that both parties were equally to blame, and dismissed the action and counter-claim without costs.—Both parties appealed, but upon the argument before the Court the plaintiff conceded that there was

negligence on his part. The defendant contended that, although the captain of his vessel did not blow the first blast, as required by article 29 of the rules of navigation, that neglect was not the cause of the collision:—*Held*, that the findings of *BOYD, C.*, on the question of negligence on the part of the defendant, were well supported by the evidence, and the negligence found was sufficient to fix the defendant with liability without considering the omission to blow a long blast, as required by law, on approaching the point of danger; and it was, therefore, unnecessary to decide the question as to the effect of the defendant's default in that regard, or whether the plaintiff had made out a *prima facie* case of negligence on the part of the defendant so as to shift the burden of proof.—Judgment of *BOYD, C.*, varied by directing a reference to assess and apportion the damages having regard to sec. 918 of the Canada Shipping Act. *Shipman v. Phinn*, 329.

SOLICITOR.

Agreement Made with Client in Foreign Country—Contingent Fee—Share of Estate—Champerty—Law of Ontario—Foreign Law—Agreement Made after Relationship of Solicitor and Client Arose—Duty of Solicitor—Action to Set aside Agreement—Evidence—Extortionate and Unconscionable Bargain.—The plaintiff was entitled under the will of her father-in-law to the whole of his estate remaining after the de-

cease of his widow, in the event of her surviving her brother-in-law, who was to have the income for his life. The estate was in Ontario, in the hands of a trustee. After the death of the widow, the brother-in-law being alive, the plaintiff, who was living in the State of California, in needy circumstances, consulted the defendant, an attorney practising in that State, who had formerly been a member of the Ontario Bar, as to whether she could get something presently from the estate; and an agreement was then made between them, in California, whereby he was to endeavour by negotiation to obtain from the brother-in-law some portion of the estate by way of settlement or compromise, and, in the event of his being successful, he was to have for his remuneration one-half of the sum received. In the event of the brother-in-law dying before any settlement should be effected, the defendant was to have one-fourth of what the plaintiff might receive under the will. The plaintiff had no professional advice other than the defendant's, and stated that she relied upon him. No settlement was effected, the brother-in-law died, and the defendant claimed one-fourth of the estate:—*Held*, that it was not necessary to decide whether the validity of the agreement and the rights of the parties under it were to be determined by the law of Ontario or by that of California, for in either case the nature and terms of the agreement and the circumstances in

which it was entered into were such that it must be considered extortionate and unconscionable so as to be inequitable against the plaintiff and not binding upon her.—In bargaining with a woman who was, as the defendant knew, in dire straits for money, out of employment, and dependent on the generosity of a friend for even the means of subsistence, as well as in bad health, and therefore likely to jump at anything which seemed to promise even the chance of getting money, regardless of the price she was to pay for it, every principle of fair dealing demanded that, before exacting such a price for his services as the defendant stipulated, he should have taken care to see that she thoroughly understood not merely the terms but the effect of the agreement she was entering into, and that he did not do; and, even if he had done so, he could not escape from the position of having exacted from her an agreement which required her to pay him for his services a compensation which he must have known was grossly in excess of the value of any services he was likely to be called upon to render.—*Per* MEREDITH, C.J.O.:—An agreement that the attorney's compensation for services rendered in recovering property for his client shall be a share of the property or a proportion of its value, though not valid and binding upon the client according to the law of Ontario, is not, *per se*—provided that the compensation is not extortionate and un-

conscionable so as to be inequitable against the client—opposed to public policy: the view expressed in *Ram Coomar Coondée v. Chunder Canto Mookerjee* (1876), 2 App. Cas. 186, 209, is to be preferred to that expressed in *Strange v. Brennan* (1846), 2 Coop. temp. Cott. 1.—*Per* KELLY, J., at the trial:—When the agreement was made, the relation of solicitor and client existed, and, according to the laws of the State of California, where the agreement was made and the parties then resided, the agreement could not be upheld.—*Per* GARROW, J.A.:—The agreement was intended to be carried into effect in Ontario; the parties must be presumed to have intended to submit themselves to the law of Ontario, which must therefore govern; and the agreement was abnoxious to the law of Ontario respecting champerty and for that reason void. But, if the proper conclusion as to forum was otherwise, the Court here is not bound to enforce an agreement made in a foreign country, even though valid there, which is contrary to the law of this Province. *MacMahon v. Taugher*, 494.

SPECIFIC PERFORMANCE.

See VENDOR AND PURCHASER, 2, 3.

STATUTE OF LIMITATIONS.

See LIMITATION OF ACTIONS.

STATUTES.

30 & 31 Vict. ch. 3, sec. 93 (Imp.)
(British North America Act).
See CONSTITUTIONAL LAW.

- 35 Vict. ch. 64 (O.) (Sandwich Windsor and Amherstburg Railway).
See STREET RAILWAYS.
- 35 Vict. ch. 79 (O.) (Toronto Waterworks).
See NUISANCE.
- 36 Vict. ch. 100 (O.) (Incorporating Hamilton Street Railway Company).
See HIGHWAY, 2.
- 41 Vict. ch. 41 (O.) (Toronto Waterworks).
See NUISANCE.
- 50 Vict. ch. 80 (O.) (Sandwich Windsor and Amherstburg Railway).
See STREET RAILWAYS.
- 59 Vict. ch. 35, sec. 21 (2) (Amending Mechanics Lien Act).
See MECHANICS' LIENS.
- R.S.O. 1897, ch. 51, secs. 25, 26, 28, 34 (Judicature Act).
See MARRIAGE.
- R.S.O. 1897, ch. 51, sec. 38.
See TITLE TO LAND.
- R.S.O. 1897, ch. 129, sec. 40 (Trustee Act).
See PARTNERSHIP.
- R.S.O. 1897, ch. 224, secs. 75, 84 (Assessment Act).
See ONTARIO RAILWAY AND MUNICIPAL BOARD.
- R.S.O. 1897, ch. 224, sec. 149.
See LIMITATION OF ACTIONS, 1.
- R.S.O. 1897, ch. 225, secs. 40-59 (Municipal Institutions in Territorial Districts).
See ONTARIO RAILWAY AND MUNICIPAL BOARD.
- R.S.O. 1897, ch. 285, secs. 3, 8 (Ditches and Watercourses Act).
See DITCHES AND WATERCOURSES ACT.
- 3 Edw. VII. ch. 19, sec. 569 (1) (O.) (Municipal Act).
See STREET RAILWAYS.
- 3 Edw. VII. ch. 112 (O.) (Sandwich Windsor and Amherstburg Railway).
See STREET RAILWAYS.
- 4 Edw. VII. ch. 23, sec. 76 (O.) (Assessment Act).
See ONTARIO RAILWAY AND MUNICIPAL BOARD.
- 4 Edw. VII. ch. 24, sec. 5 (O.) (Amending Act respecting Municipal Institutions in Territorial Districts).
See ONTARIO RAILWAY AND MUNICIPAL BOARD.
- 4 & 5 Edw. VII. ch. 125 (D.) (Incorporating Monarch Bank of Canada).
See BANKS AND BANKING.
- 5 Edw. VII. ch. 24, secs. 1, 2, 3 (O.) (Amending Act respecting Municipal Institutions in Territorial Districts).
See ONTARIO RAILWAY AND MUNICIPAL BOARD.
- 6 Edw. VII. ch. 31, secs. 43, 52 (O.) (Ontario Railway and Municipal Board Act).
See ONTARIO RAILWAY AND MUNICIPAL BOARD.
- R.S.C. 1906, ch. 29, secs. 11, 12, 13, 20, 34 (Bank Act).
See BANKS AND BANKING.
- R.S.C. 1906, ch. 37, sec. 264 (5) (Railway Act).
See RAILWAY, 5.
- R.S.C. 1906, ch. 37, secs. 297, 306
See RAILWAY, 1.
- R.S.C. 1906, ch. 37, sec. 341.
See RAILWAY, 2.
- R.S.C. 1906, ch. 113, sec. 918 (Shipping Act).
See SHIP.
- R.S.C. 1906, ch. 119, sec. 54 (2) (Bills of Exchange Act).
See PROMISSORY NOTE.
- R.S.C. 1906, ch. 144, secs. 2 (g), 51, 60, 93 (Winding-up Act).
See BANKS AND BANKING.
- R.S.C. 1906, ch. 146, sec. 287 (Criminal Code).
See WATER.
- R.S.C. 1906, ch. 146, sec. 292.
See CRIMINAL LAW, 2.
- R.S.C. 1906, ch. 146, sec. 576.
See CRIMINAL LAW, 1.
- 7 Edw. VII. ch. 16 (O.) (Highway Improvement Act).
See HIGHWAY, 1.
- 10 Edw. VII. ch. 81, secs. 3, 4 (O.) (Amending Railway Act).
See STREET RAILWAYS.
- 10 Edw. VII. ch. 88, sec. 18 (O.) (Amending Assessment Act).
See ONTARIO RAILWAY AND MUNICIPAL BOARD.
- 1 Geo. V. ch. 26, sec. 66 (O.) (Trustee Act).
See PARTNERSHIP.
- 1 Geo. V. ch. 49 (O.) (Innkeepers Act).
See INNKEEPER, 2.
- 2 Geo. V. ch. 31, sec. 96 (O.) (Companies Act).
See COMPANY.
- 2 Geo. V. ch. 42, secs. 3, 4 (O.) (Municipal Franchises Act).
See STREET RAILWAYS.
- 3 & 4 Geo. V. ch. 36, secs. 232, 250, 251 (O.) (Railway Act).
See STREET RAILWAYS.

3 & 4 Geo. V. ch. 37 (O.) (Ontario Railway and Municipal Board Act).
See ONTARIO RAILWAY AND MUNICIPAL BOARD.
 3 & 4 Geo. V. ch. 43 (O.) (Municipal Act).
See ONTARIO RAILWAY AND MUNICIPAL BOARD.
 3 & 4 Geo. V. ch. 46, sec. 13 (O.) (Amending Assessment Act).
See ONTARIO RAILWAY AND MUNICIPAL BOARD.
 R.S.O. 1914, ch. 8, secs. 71 (2), 102, 114, 117, 138 (Election Act).
See PARLIAMENTARY ELECTIONS.
 R.S.O. 1914, ch. 32, secs. 164, 174, 175 (Mining Act).
See MINES AND MINERALS.
 R.S.O. 1914, ch. 46 (Workmen's Compensation for Injuries Act).
See MASTER AND SERVANT, 3, 4.
 R.S.O. 1914, ch. 56, sec. 27 (Judicature Act).
See INNKEEPER, 1—MASTER AND SERVANT, 4.
 R.S.O. 1914, ch. 56, sec. 28.
See RAILWAY, 6.
 R.S.O. 1914, ch. 75 (Limitations Act).
See LIMITATION OF ACTIONS.
 R.S.O. 1914, ch. 76, sec. 46 (Evidence Act).
See TITLE TO LAND.
 R.S.O. 1914, ch. 126, secs. 30 (2), 45, 115 (Land Titles Act).
See LAND TITLES ACT.
 R.S.O. 1914, ch. 135, sec. 5 (Bills of Sale and Chattel Mortgage Act).
See CHATTEL MORTGAGE.
 R.S.O. 1914, ch. 140, sec. 22 (2) (Mechanics and Wage-Earners Lien Act).
See MECHANICS' LIENS.
 R.S.O. 1914, ch. 148, secs. 36, 37 (Marriage Act).
See MARRIAGE.
 R.S.O. 1914, ch. 151 (Fatal Accidents Act).
See MASTER AND SERVANT, 1—NEGLIGENCE, 2.
 R.S.O. 1914, ch. 156, sec. 4 (Apportionment Act).
See LANDLORD AND TENANT, 2.
 R.S.O. 1914, ch. 166, secs. 17, 33 (Surveys Act).
See HIGHWAY, 1.
 R.S.O. 1914, ch. 173, secs. 4, 6 (Innkeepers Act).
See INNKEEPER, 1, 2.
 R.S.O. 1914, ch. 183, sec. 165 (Insurance Act).
See INSURANCE.

R.S.O. 1914, ch. 184, sec. 18 (e) (Loan and Trust Corporations Act).
See INFANT, 2.
 R.S.O. 1914, ch. 192, sec. 295 (4) (Municipal Act).
See MUNICIPAL CORPORATIONS, 3.
 R.S.O. 1914, ch. 192, sec. 325.
See MUNICIPAL CORPORATIONS, 2.
 R.S.O. 1914, ch. 192, sec. 400 (49) (Municipal Act).
See MUNICIPAL CORPORATIONS, 1.
 R.S.O. 1914, ch. 195, secs. 94, 171 (Assessment Act).
See LIMITATION OF ACTIONS, 1.
 R.S.O. 1914, ch. 197, secs. 3, 4 (Municipal Franchises Act).
See STREET RAILWAYS.

STATUTORY AUTHORITY AND DUTY.

See MINES AND MINERALS—MUNICIPAL CORPORATIONS, 1—NUISANCE — RAILWAY, 1, 5 — WATER.

STAY OF PROCEEDINGS.

See ALIEN ENEMY, 1, 3.

STREET RAILWAYS.

Extension of Lines upon Streets of City—Authority—Agreements with City Corporation—By-laws—Private Acts—Municipal Franchises Act, 2 Geo. V. ch. 42, secs. 3, 4—Ontario Railway Act, 3 & 4 Geo. V. ch. 36, secs. 232, 250, 251—Approval by Ratepayers of By-law Authorising Extension—Confirmation by Ontario Railway and Municipal Board — Nuisance — Peculiar Damage — Parties — Municipal Corporation—Injunction — Mandamus — Damages.]
 —The plaintiffs, suing on behalf of themselves and all other ratepayers of the city of W., sought to restrain the defendants, an incorporated company, from constructing a line of railway, an extension of their existing rail-

way, upon certain streets of the city; a mandamus to the defendants to restore the streets, so far as interfered with, to their original condition; and damages. The city council, by a by-law of the 27th April, 1914, purported to authorise and empower the defendants to construct the extension. This by-law was not submitted to the ratepayers for approval, and was not confirmed by the Ontario Railway and Municipal Board:—*Held*, having regard to the original charter of the defendants, the Ontario statute 35 Vict. ch. 64, the subsequent statutes 50 Vict. ch. 80, 56 Vict. ch. 97, and 3 Edw. VII. ch. 112, certain by-laws of the city of W. and agreements between the defendants and the city corporation, and also to the provisions of sec. 569 (1) of the Consolidated Municipal Act, 1903, 3 Edw. VII. ch. 19, 10 Edw. VII. ch. 81, secs. 3, 4, the Municipal Franchises Act, 2 Geo. V. ch. 42 (R.S.O. 1914, ch. 197), secs. 3, 4, and the Ontario Railway Act, 3 & 4 Geo. V. ch. 36, secs. 232, 250, 251, that the defendants' right to use the streets referred to for their railway rested upon the agreements with the city corporation of the 17th April, 1893, and the 4th July, 1893, as modified by the agreement of the 28th July, 1902, validated by 3 Edw. VII. ch. 112; and, that being a special Act passed before the 16th March, 1909, the date mentioned in sec. 4 (2) of the Municipal Franchises Act, the application of sec. 4 of that Act to the defendants' fran-

chise was excluded, and it was not compulsory upon the city corporation to submit the by-law authorising the construction of the railway on the streets referred to for the approval of the ratepayers.—But *held*, that, the defendants being subject to the provisions of the Ontario Railway Act, the proposed extension came within the meaning of sec. 250, sub-sec. 2, and required the sanction of the Board, notwithstanding the terms of the agreements. The new sub-sec. 3 of sec. 250, requiring the approval of the Board, came into force on the 1st July, 1913; the acts complained of by the plaintiffs occurred in April, 1914; and, the sanction of the Board not having been obtained, those acts were without authority and illegal, and created a nuisance on the streets referred to.—*Held*, also, that the plaintiff D. suffered peculiar damage by reason of the acts of the defendants upon these streets.—*Held*, also, that the city corporation was not a necessary party to the action.—Judgment of LENNOX, J., granting the plaintiffs the relief prayed for, affirmed. *Mitchell and Dresch v. Sandwich Windsor and Amherstburg R.W. Co.*, 594.

See HIGHWAY, 2.

SUMMARY JUDGMENT.

See JUDGMENT, 2.

SUNDAY.

See CONTRACT, 2.

SURRENDER.

See LANDLORD AND TENANT, 2.

SURROGATE COURTS.

See TITLE TO LAND.

TAX SALE.

See LIMITATION OF ACTIONS, 1.

TESTAMENTARY CAPACITY.

See WILL.

TIME.

See CONTRACT, 2—DITCHES AND WATERCOURSES ACT—INSURANCE — MECHANICS' LIENS — PRACTICE—RAILWAY, 1 — VENDOR AND PURCHASER, 1.

TITLE TO LAND.

Devise—Revocation of Will by Marriage — Void Marriage by Reason of Previous Marriage—Proof of Previous Marriage—Testimony of First Wife—Sufficiency—De Facto Marriage—Presumption from Cohabitation — Proof of Death of Testatrix—Presumption from Grant of Probate—Onus—Jurisdiction of Surrogate Court—Presumption of Continuance of Life—Presumption of Fact —Judicature Act, R.S.O. 1897, ch. 51, sec. 38—Conveyance under Power of Attorney—Alteration of Sealed Instrument—Presumption as to Time of Making—Rebuttal—Evidence Act, R.S.O. 1914, ch. 76, sec. 46—Production of Copy of Instrument—Possession of land—Mesne Profits—Waste—Improvements — Set-off — Costs.] — The plaintiff, as executrix and sole devisee under the will of G., called "the testatrix," sought to

recover possession of land in Ontario owned by the testatrix, to which the defendant claimed title under a conveyance alleged to have been made to him by the testatrix, in fact executed in her name by her attorney, J., with whom she had lived as his wife after going through a marriage ceremony with him. The conveyance was dated the 8th December, 1906; the will was dated the 15th January, 1897, and was admitted to probate by a Surrogate Court on the 18th November, 1911; the marriage ceremony was in June, 1905; the power of attorney under which J. purported to act was dated the 27th September, 1905; and the date of the death of the testatrix, as stated in the letters probate, was the 31st October, 1905. It was proved by the testimony of another woman that she had gone through a ceremony of marriage with J. in 1903, and that they afterwards lived together and believed themselves to be man and wife. She also testified that she had been informed that no marriage license was ever issued for the marriage, and that no trace could be found in the place where the ceremony took place of a minister bearing the name claimed by the man who performed the ceremony, and who professed to be a minister:—*Held*, that this evidence was sufficient to prove the previous marriage of J.; and, therefore, the marriage of the testatrix to J. was no marriage, his first wife being alive, and the will under which the plaintiff claimed

was not revoked by the marriage of the testatrix.—Except in cases of bigamy and actions for criminal conversation there is a strong presumption in favour of the validity of a marriage proved to have been celebrated *de facto*; and mere cohabitation may suffice to raise a presumption of valid marriage.—The probate of a will is conclusive until revoked, and no Court of law can admit evidence to impeach it: *Allen v. Dundas* (1789), 3 T.R. 125. This proposition is not in its entirety applicable in Ontario because by the Judicature Act, R.S.O. 1897, ch. 51, sec. 38, the Supreme Court has jurisdiction to try the validity of wills, whether probate has been granted or not.—The onus of establishing want of jurisdiction upon the ground that the testatrix was alive when probate was granted was upon the defendant; and in this he failed.—There is no presumption of law as to the continuance of life, though an inference of fact may legitimately be drawn that a person alive and in health at a certain time was alive a short time after. Whether such an inference should be drawn depends upon the particular facts of the case in which the question arises; and the facts in this case did not warrant the inference that the testatrix was alive at any time later than the beginning of 1906, but rather justified the inference that she was then dead. The presumption of death, not as a matter of law but as a matter of fact, may arise; and this although seven years from

the time the person was last heard of have not elapsed.—*In the Goods of Matthews*, [1898] P. 17, and *In the Goods of Winstone*, *ib.* 143, referred to.—And *held*, upon the evidence, that the power of attorney as drawn and executed by the testatrix did not contain any provision authorising J. to deal with lands in Canada, but was limited to lands in Alaska; and the provision extending his authority to lands in Canada was subsequently added.—It is to be presumed that alterations appearing in a deed were made before it was executed, but it is not the law that where that presumption has been rebutted by proof to the contrary there is still a presumption that the alterations were made with the assent of the grantor.—The *prima facie* evidence of the original which is afforded by the production of a copy of the instrument certified as sec. 46 of the Evidence Act, R.S.O. 1914, ch. 76, provides, is rebutted by the evidence which rebuts the presumption above referred to.—*Held*, therefore, that the plaintiff was entitled to judgment for the recovery of possession of the land, but not for the recovery of mesne profits or damages for the cutting of timber, the claims for which were offset by the value of the improvements which the defendant had made.—*Held*, also, that, as the defendant had bought and paid for the land in good faith, believing that J. had authority to sell and convey to him, there should be no costs.—Judgment

of LENNOX, J., reversed. *Hedge v. Morrow*, 218.

TRADE AGREEMENT.

See COVENANT.

TRIAL.

See MARRIAGE.

TRUST COMPANY.

See INFANT, 2.

TRUSTS AND TRUSTEES.

Shares in Limited Commercial Company Held by Trustee for Estate—Issue of New Shares—Purchase by Trustee for himself—Loss of Control of Company—Depreciation in Value of Shares—Conflict between Interest and Duty—Removal of Trustee—Action Previously Brought to Determine Duty of Trustee Pending and Undisposed of—Declaration of Trust in Respect of New Shares—Evidence.]—A testator dying in 1898 appointed a trust company his executors, and devised and bequeathed to them his estate upon trust to sell and convert into money, and out of the proceeds to pay debts and legacies, to set apart sufficient to produce an annual sum which they were to pay to his widow, and ultimately to distribute the estate among his children. The defendant, a son of the testator, in 1907 became trustee in place of the trust company, upon the terms either of the will or of an unsigned declaration of trust then prepared. In May, 1912, an action was begun by two of his brothers against the defendant to prevent the

division among the family of 244 shares in a limited commercial company which formed part of the estate, and to compel the sale of the shares *en bloc*. While that action was pending, the defendant acquired in his own right 74 shares from the company, paying for them the par value. Before the issue of these 74 shares, the 244 shares held by the estate were a majority of the shares issued, but, after the 74 were put out, the estate holding was less than 51 per cent. One of the plaintiffs in the first action then brought this action—leaving the other pending and undisposed of—to remove the defendant from his position as trustee and to have it declared that he was a trustee for the beneficiaries under the will of the 74 shares. The issue of the 74 shares at par to the defendant was ratified and approved of by the shareholders of the company at a meeting duly called:—*Held*, that, so long as the first action was pending, it would be unjust to remove the defendant from his position as trustee; and, upon the evidence, no case was made for declaring him a trustee for the estate of the 74 shares.—The judgment of BOYD, C., dismissing the action, was affirmed, subject to the right of the plaintiff to apply, after the final disposition of the first action, under the Trustee Act, for the removal of the defendant as trustee, if in that action the rights declared should leave it open to him so to do.—*Semble*, that control of a limited company vested in an estate or in an in-

dividual is of importance apart from the intrinsic value of the holding.—Review of the authorities in regard to conflict between the interest and duty of a trustee.—*Semble*, that the principle of the decisions extends to any act where it is established that there is a direct conflict, and to cases where it may be reasonably said that such a conflict may arise.—And *semble*, having in view the possibility that the voting power on the 74 shares might in some event be used against that of the estate so as to depreciate their value, if it became a question of control, the defendant should relinquish the trust or be removed from it.—*Morre v. McGlynn*, [1894] 1 I.R. 74, applied. *Rose v. Rose*, 481.

See LAND TITLES ACT—PARTNERSHIP — VENDOR AND PURCHASER, 2.

ULTRA VIRES.

See CONSTITUTIONAL LAW.

VALUATION.

See LANDLORD AND TENANT, 1.

VENDOR AND PURCHASER.

1. *Agreement for Sale of Land—Provision for Closing Sale at Fixed Time—Time of Essence—Right of Vendor to Cancel on Default of Purchaser—Extension of Time—New Agreement—Consideration—Importation of Time-clause—Payment of Part of Purchase-money—Refusal of Vendor to Complete Sale on New Day Fixed—Right of Purchaser to Treat Agreement as Terminated—*

Right to Return of Sum Paid—Subsequent Offer of Purchaser to Carry out Sale—Equitable Relief—Common Law Right of Vendor not Excluded by Special Privilege in Favour of Purchaser.—By a written agreement between the defendant and V., the defendant agreed to sell and V. agreed to buy land owned by the defendant. Thereafter, by a written agreement between V. and the plaintiff, the former agreed to sell the land to the plaintiff, and the plaintiff agreed to buy the same. By the terms of the latter agreement the sale was to be completed on or before the 15th November, and time was to be of the essence of the agreement. The title was in the defendant, and the plaintiff was directed by V. to complete the purchase with the defendant. On or before the 14th November, the title had been accepted, the conveyance approved of and executed by the defendant, and deposited with his solicitor for delivery on the closing of the transaction. On the 15th November, the solicitors for the parties met, but the plaintiff was not ready with the whole of his purchase-money, and it was agreed between the solicitors that the time for completion should be extended until the 17th November, on the plaintiff paying to the defendant's solicitor \$1,000, which the plaintiff then paid, on account of the purchase-money. On the 17th November, the plaintiff tendered the balance of his purchase-money to the defendant, who refused to accept it, and refused to deliver the con-

veyance. On the 18th November, the plaintiff notified the defendant that the refusal to complete the purchase on the previous day was regarded as a refusal to carry out the contract and that the plaintiff withdrew from it, and demanded the return of the \$1,000. Subsequently the defendant offered to carry out the contract, but the plaintiff adhered to his position, and brought this action for the \$1,000:—*Held*, that the agreement of the solicitors on the 15th November created a new contract between the parties, whereby, in consideration of \$1,000 then paid by the plaintiff to the defendant, the latter agreed to deliver to the plaintiff, on the 17th November, the executed conveyance; that the defendant's conduct on the 17th amounted to an absolute refusal to perform the contract; and that the plaintiff was entitled to treat the contract as at an end, and to the return of the \$1,000.—Judgment of MIDDLETON, J., affirmed. — *Held*, per MIDDLETON, J., that the new contract made on the 15th was a contract which embodied in it by implication all the appropriate terms of the original agreement, and thus time became and was of the essence of the contract. As soon as the defendant refused to carry out this agreement, he was guilty of a breach, and the right of action in the plaintiff to recover the \$1,000, as upon failure of consideration, became vested in him. An offer to perform after the expiry of the time fixed is not a defence. It may be

a ground for application to the Court for equitable relief from the default; but, if the defendant was to be regarded as making such an application, no ground for interference was shewn.—The clause in the original agreement making time of the essence of the contract was followed by a clause giving the vendor the right to treat the contract as cancelled if any of the stipulations as to time, title, etc., were not observed by the purchaser:—*Held*, per RIDDELL, J., that the right to treat the contract as cancelled was merely ancillary to the substantial right. The rights annexed by law to a contract in favour of one party thereto are not limited by an express right in excess of those annexed by law in favour of the other. At the common law, time was always strictly of the essence of the contract; and, when time is by express provision made of the essence of the contract, the rights of the parties are still as at the common law. If the vendor is not ready and willing to perform his part of the contract at the time specified, the purchaser may at once bring his action; and it is no answer that the vendor is afterwards able and willing to implement his agreement. *Winnifrith v. Finkleman*, 318.

2. *Agreement for Sale of Land—Specific Performance—Water Lot—Conveyance—Title—Trust for Remaindermen—Costs.*—Two questions were left open when the judgment in 29 O.L.R. 534

was given; and as to these it was now *held*, that, as between the parties to the action, it had not been established that the defendant was a trustee of the remainder in fee in the water lot in question for his children, and that specific performance in respect of the water lot should be adjudged; (2) that the trial Judge's disposition of the costs of the action should not be disturbed, but that there should be no costs of the appeal to either party. *Ontario Asphalt Block Co. v. Montreuil*, 243.

3. *Agreement for Sale of Land outside of Province—Assignment of Interest by Vendor after Agreement — Notice — Obligation of Assignee to Convey to Purchaser—Specific Performance—Payments Made by Purchaser before and after Assignment—Agreement between Vendor and Assignee, Nature of—Costs—Form of Judgment.*—In May, 1912, the owners of land in the Province of Saskatchewan agreed to sell it to the defendant M. The land was divided into lots. The payments were to be completed on or before the 2nd November, 1913; the vendors agreeing "to give title to one or more lots at a time, on payment of the proportionate balance due, said amount to be credited on the last payment." In October, 1912, five of the lots were sold by M. to the plaintiff; the price to be paid in instalments. In April, 1913, M. assigned his interest to the defendant B., and M.'s vendors agreed to recognise and acknow-

ledge this assignment, on the terms of B. guaranteeing to make the payments still outstanding. The plaintiff completed his payments, dealing with M. alone, in good faith, and, as to the payments made after the assignment to B., with B.'s knowledge and consent. M.'s assignment included his interest in the lots bought by the plaintiff, and B. had previous notice of the sale to the plaintiff. There was a dispute between M. and B. as to the nature of the agreement between them:—*Held*, that, whether B. was absolute owner or mortgagee with notice of the prior sales, he had acquired, in either capacity, an interest that was subject to an obligation known to him which bound him to carry out that obligation. — *Greaves v. Tofield* (1880), 14 Ch.D. 563, and *Taylor v. Stibbert* (1794), 2 Ves. Jr. 437, followed.—*Held*, therefore, that the defendant B. was bound to give the plaintiff the title he stipulated for; and the plaintiff was entitled to a judgment, in the usual form, with a reference as to title, reserving further directions, against both defendants, for specific performance, although the land was situate out of the Province.—*Montgomery v. Ruppensburg* (1899), 31 O.R. 433, approved and followed.—*Held*, also, that the judgment should be with costs against both defendants, without prejudice, in the taking of the accounts as between them, to the incidence of these costs.—As to the liability of B. for the money paid by the plaintiff before the assign-

ment to B., no opinion expressed.—Judgment of LENNOX, J., affirmed, with a variance as to the form. *Campbell v. Barrett and McCormack*, 157.

See INFANT, 1.

WAGES.

See COMPANY.

WAR.

See ALIEN ENEMY.

WASTE.

See TITLE TO LAND.

WATER.

Frozen Surface of Bay of Quinté — *Public Highway* — *Right of Travel Paramount to Right of Ice-cutters* — *Hole Cut in Ice and Insufficiently Guarded* — *Nuisance* — *Criminal Code, sec. 287* — *Run-away Horse Falling into Hole* — *Liability of Ice-cutters* — *Findings of Jury* — *Evidence* — *Negligence* — *Contributory Negligence.*] — The defendants cut ice in the Bay of Quinté and left a hole in the ice, insufficiently guarded, into which the plaintiff's horse fell and was lost. The horse was being driven by the plaintiff across the bay upon the ice, but had run away, got beyond the plaintiff's control, and departed from the travelled way upon the ice, where he would have been safe:—*Held, per MEREDITH, C.J.O., and CLUTE, J.,* that it was the duty of the defendants, both at common law and under the provisions of the Criminal Code, sec. 287, to guard the hole that had been made.—*Pennock v. Mitchell* (1908), 17

O.L.R. 286, approved.—While the purpose of sec. 287 is the safeguarding of human life, a hole, left unguarded in contravention of that section, in a public highway, as the bay is, is a nuisance; and the plaintiff, having suffered damage different in kind from that which was suffered by the public at large, was entitled to maintain an action therefor.—Review of the authorities on the question of liability in the case of runaway horses.—The true rule is that laid down in *Sherwood v. City of Hamilton* (1875), 37 U.C.R. 410; and *Bell Telephone Co. v. City of Chatham* (1900), 31 S.C.R. 61, does not stand in the way of the *Sherwood* case being applied in a case against a municipal corporation where the highway is out of repair owing to the corporation's neglect to keep it in repair; but, if the rule be otherwise, and the corporation is not liable where horses are running away, that would not help the defendants.—The Bay of Quinté—the whole bay—is a highway and open to the public, and upon its waters when frozen any person may travel on foot or driving an animal. The public have the right to cut the ice, but this right is subordinate to the right of travel, as is shewn by sec. 287; and there was no ground upon which the defendants could escape liability if the hole was not guarded as sec. 287 requires, and the absence of the guard was the cause of the horse being lost, notwithstanding that the horse had escaped from control and was running away when

he met his death, if that was not due to the negligence of the plaintiff. Upon the evidence, the hole was not guarded as sec. 287 requires, and the jury found for the plaintiff upon a charge which was not open to objection on the part of the defendants. The question of contributory negligence was also fairly left to the jury, and their verdict acquitted the plaintiff of it, and there was evidence which warranted their finding. — *Per* HODGINS, J.A.: — The act of the defendants created a nuisance. The liability of one who maintains an excavation on an area adjacent to the highway arises independently of negligence and is an absolute obligation. The occupier has to maintain a fence or other protection for those using the highway; and the duty of the defendants in relation to the hole in this highway was at least as great. It was not necessary to express an opinion upon the other points mentioned above.—*Per Curiam*: —The plaintiff was entitled to recover damages from the defendants for the loss of his horse. —Judgment of the County Court of the County of Hastings affirmed. *Little v. Smith*, 518.

WAY.

See HIGHWAY.

WILL.

Action to Establish—Evidence—Onus—Testamentary Capacity—Finding of Trial Judge against Will Propounded by Plaintiffs as Executors—Costs—Discretion—

Appeal.] — The judgment of BOYD, C., 31 O.L.R. 287, was affirmed on appeal, the Court agreeing with his reasoning and his conclusion that the plaintiffs had failed to satisfy the onus that rested upon them of establishing the testamentary capacity of the testatrix.—It was also *held*, that, as the costs are left to the discretion of the trial Judge, the Court had no power to interfere with the exercise of that discretion, the appeal having in other respects failed, and no leave having been given by the Chancellor to appeal as to costs. *Murphy v. Lamphier*, 19.

See DOMICILE — TITLE TO LAND.

WINDING-UP.

See BANKS AND BANKING.

WORDS.

“*Amount Proper to be Paid.*”] — *See* LANDLORD AND TENANT, 1.

“*Class of Persons.*”] — *See* CONSTITUTIONAL LAW.

“*Competing.*”] — *See* PARTNERSHIP.

“*Concession.*”] — *See* HIGHWAY, 1.

“*Denominational Schools.*”] — *See* CONSTITUTIONAL LAW.

“*Guardian of an Infant.*”] — *See* DITCHES AND WATERCOURSES ACT.

“*Imminent Danger.*”] — *See* RAILWAY, 6.

“*Last Material.*”] — *See* MECHANICS’ LIENS.

"Operation of the Railway."—
See RAILWAY, 1.

"Owner."—See DITCHES AND
WATERCOURSES ACT.

"Settlers' Effects."—See RAIL-
WAY, 2.

"Shareholders."—See BANKS
AND BANKING.

**WORKMEN'S COMPENSA-
TION FOR INJURIES ACT.**

See MASTER AND SERVANT, 3,
4.

